127-338

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

vs.

CHARLES W. BEEBE ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED NOVEMBER 10, 1884.

Transcript
of
Record
1857
(Vol 7)
Supreme Court U.S.
127 U.S.
388-390

7-338
127-338

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

vs.

CHARLES W. BEEBE ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED NOVEMBER 10, 1884.

accession 28856

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

vs.

CHARLES W. BEEBE ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Letter of Attorney General to United States District Attorney, Little Rock, Arkansas, June 7, 1882	22	7
Petition of Cummings and Baker to Attorney General, October 25, 1882	25	8
Letter of Attorney General to United States District Attorney, October 25, 1882	27	9
Petition for rule on clerk	29	9
Motion for rule on clerk	40	13
Amplification of petition and motion for rule on clerk	42	13
Orders on motion for rule on clerk	49	15
Response of clerk to rule	51	16
Letter of United States District Attorney to Judge McCrary, January 26, 1883	55	17
Letter of United States District Attorney to Clerk, January 26, 1883	58	18
Clerk's certificate	59	18
Letter of United States District Attorney to Attorney General, December 15, 1882	60	18
Order on clerk's return to rule	69	21
Bond of indemnity	72	21
Disqualification of Judge Caldwell	75	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 1, 1887.

	Original.	Print.
Motion to require plaintiff to file exhibits	76	23
" " bond for costs	77	23
Demurrer of Martin *et ux.*	79	24
Plea of Ratcliffe, administrator	81	25
Motion to dismiss by defendant Faust	82	25
Motion to require plaintiffs to file exhibits	83	25
Plea of Ratcliffe, administrator, of Statute of Limitations	85	26
Replication to plea of Statute of Limitations	87	27
Motion to set demurrer for hearing	90	28
Motion to set pleas for hearing	91	28
Affidavit of A. H. Garland	93	29
Exhibit A—Letter of Attorney General to Garland, February 26, 1883	94	29
Notice to comply with rules	96	30
Motion to remove overruled, &c.	98	31
Demurrer of Ratcliffe, administrator	99	31
Letter of Judge Caldwell to Secretary McCrary, September 27, 1877	103	32
Petition to remove to another district	105	33
Motion to remove to another district	113	35
Letter of Attorney General to District Attorney, April 10, 1883	117	37
Order to file exhibits, &c.	118	38
Motion to extend time to file briefs	120	38
Motion to dismiss as to Cockerham certificate No. 156	122	38
Motion to strike defendants' brief from files	123	39
Order sustaining demurrer, &c.	125	40
Amendment to bill	127	40
Exhibit N—Affidavit of T. H. Ellison	185	57
C—Deed of O'Hara *et ux.* to DeBaum, April 11, 1821	199	61
C^1—Deed of DeBaum to Philbrook, March 18, 1882	207	63
C^2— " " " "	214	65
C^3—Power of attorney of Philbrook to Ashley, October 30, 1821	222	67
C^7—Power of attorney of Elliott *et al.* to Ashley, October 29, 1821	227	69
C^8—Assent to compromise, December 28, 1821	234	71
Demurrer of Martin *et ux.*	240	72
Plea of Ratcliffe, administrator	244	74
Motion of Ratcliffe, administrator, to dismiss	245	74
" Faust to dismiss	246	74
Replication to pleas	248	75
Motion to set demurrers	282	85
Orders sustaining demurrers and granting appeal	285	86
Affidavit of Henry C. Caldwell	287	86
Clerk's certificate	293	88

1 Be it remembered that on the 31st day of January, 1883, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas the United States of America, by her Attorney General, Benjamin H. Brewster, and by Liberty Bartlett, and Cummings & Baker, Esqs., their solicitors, and filed therein their bill of complaint against Charles W. Beebe *et al.*, which bill of complaint is as follows:

Complaint in Equity.

In the Circuit Court of the United States for the Eastern District of Arkansas.

THE UNITED STATES OF AMERICA, by her Attorney General, Benjamin H. Brewster, Complainant,
against
CHARLES W. BEEBE *et al.*, Defendants.

To the honorable the judges of the circuit court of the United States for the eastern district of Arkansas:

2 The United States of America, by her Attorney General, Benjamin H. Brewster, complainant, brings this her bill of complaint against Charles W. Beebe, Thomas Fraser, Julia Fraser, a minor, who are citizens of the State of California; Joseph W. Martin and Emma Martin, his wife, formerly Beebe; Hartwell Beebe, a minor; Kate Faust, Emma Faust, John Faust, Fannie Faust, Roswell Faust, and Henry Faust, minors, and heirs of Cora F. Faust, formerly Beebe; William C. Ratcliff, administrator of said Cora F. and guardian of said minors, Kate, Emma, John, Fannie, Roswell, and Henry Faust, all heirs-at-law of Roswell Beebe, deceased, defendants, who are citizens of the State of Arkansas, and thereupon, humbly complaining, your orator respectfully alleges, states, and shows—

That the lands involved in this suit are over the value of and worth more than five thousand dollars.

That under and by virtue of an act of Congress, entitled "An act for the relief of the inhabitants of New Madrid who suffered by earthquake," approved February 17th, 1815, certificates com-
3 monly called and known as "New Madrid certificates" were duly issued in November, 1815, by Frederic Bates, recorder of land titles of the United States land office for Missouri, &c., at Saint Louis, Missouri, as follows: Certificate number 8, to Francis Lesieur, for 160 acres of land; certificate number 15, to Peter Porier, for 160 acres of land; certificate number 156, for 640 acres of land, to Henry Cockerham, and certificate number 264, to Elvy Dejarlois, for 160 acres of land, true exemplifications of which are herewith filed and marked Exhibit "A," &c.

That said certificates authorized the holders thereof to locate the quantities of land therein embraced on any of the public lands of the United States in the said Territory of Missouri, of which the present State of Arkansas formed a part, the sale of which was authorized by law.

That under and by virtue of the provisions of said act of Congress and during the years 1819 and 1820 all of said certificates
4 were duly located on the lands hereinafter described, and the locations thereof were duly surveyed by the United States surveyor and returned to the recorder of land titles at the United States land office at St. Louis, Missouri; that the surveys of the lands located with said certificates numbered 8, 15, and 264, respectively, were numbered 2512, 2493, and 2471, and were returned to said recorder on the 17th day of October, 1820, and the return of the survey of the lands located with certificate number 156 was, as your orator believes and avers, made at the same time (Oct. 17th, 1820), but for some reason the same lands were again surveyed and the resurvey, numbered 2489, was returned to the said recorder on the 2nd day of May, 1839.

That the location referred to is the plat and certificates of survey returned to the recorder of said land titles, and is by the laws of the United States deemed the first appropriation of the land.

That all of said lands under the locations and appropria-
5 tion aforesaid (until the legal title thereto was unlawfully and wrongfully granted to others, as hereinafter set forth) — continuously and openly in the possession of the holders of said certificates and their assigns under said location and surveys.

That said locations and surveys were of lands situated south of the Arkansas river and in the present (then Territory) State of Arkansas that had not yet been surveyed into regular townships and sections, but were, when so subsequently surveyed, ascertained to embrace and comprise the following lands, viz: All of section 3, the north half of section 10, ninety-six (96) acres off of the west side of fractional section two (2), and sixty-six (66) acres off of the west side of the northwest quarter of section eleven (11), all in township one (1) north of the base line and of range twelve (12) west of the 5th principal meridian, and now in Pulaski county, Arkansas. True exemplifications of said locations and surveys and of the re-
6 turn thereof are herewith filed and marked Exhibits "B."

That said lands were formerly within the Quapaw Indian reservation, but were ceded to the United States by treaty of August, 24th, 1818, thus becoming part of the public domain, and were subject to entry and location and were located and appropriated by the said holders of said certificates, and thereby the equitable title of the United States passed to and vested in said locators and their assigns.

That by proper assignments and conveyances, in due form of law, all of said New Madrid certificates and the lands located therewith and thereunder became vested in one W. M. O'Hara and, by direct and mesne conveyances, in Nathaniel Philbrook and Chester Ashley, each an undivided one-half interest, exemplifications and duly certified copies of which are herewith filed, marked Exhibits "C," "C^1," "C^2," "C^3," "C^4," &c.

7 That on the 10th day of September, 1875, the U. S. recorder of land titles at Saint Louis, Missouri, issued his patent certificates, numbered 513, 514, 515, and 516, to said original locators

and their legal representatives for said lands above described, in accordance with and in pursuance of said locations, surveys, and returns, true exemplifications of which are herewith filed, marked Exhibits D, D^1, D^2, D^3, D^4, &c.

That from the time of said locations, surveys, and returns aforesaid to the year 1838–'9, the said New Madrid locations were the only titles to said lands and were considered good; the town of Little Rock was laid out and built on said lands and duly incorporated, and contained hundreds of settlers and citizens long prior to the issuance of the irregular, unlawful, and fraudulent float certificates and patents hereinafter described.

That in 1824 said Nathaniel Philbrook died seized and possessed of an undivided half of said lands under said New Madrid
8 location, &c. (except small portions that he and other owners had released), and left surviving him no widow nor children, but his father, Eliphalet Philbrook, late of New Hampshire, his sole heir-at-law, who, in the year 1828, died testate, seized of said lands and locations, &c.; that said Eliphalet, by his last will and testament, duly attested, proven, and recorded in the probate court for the county of Strafford, in said State of New Hampshire, and duly recorded therein, devised all of said lands to Thomas H. Ellison and six other children and grandchildren of said testator, a duly certified copy of which is herewith filed and marked Exhibit "E," the original not being accessible.

That said devisees and heirs of such as are deceased have by proper conveyances conveyed said lands to George V. Dietrich, Jabez C. Hurst, citizens of Galesburg, Illinois, and John F. Calder, a citizen of Troy, New York, in trust to apply for and obtain patent titles thereto from the United States, a copy of which is herewith
9 filed, marked Exhibit "F," the original held subject to the inspection of the court.

That said Dietrich and others, as such trustees, have applied to the proper United States authorities for patents to said lands to which they claim to be entitled by reason of said locations, surveys, patent certificates, and conveyances, but such patents are refused because certificates and patents have, subsequent to said locations, &c., and under subsequent acts of Congress, been granted by the United States to other parties, as hereinafter set forth, and because a second patent cannot issue, even to fulfill a prior obligation of the United States, unless and until the first, though unlawfully granted, as your orator avers the Beebe patents hereinafter described were, be cancelled by proper proceedings to that end instituted.

That said certificates and patents so unlawfully, wrongfully, and inequitably issued contrary to the provisions of the acts of Congress and the rules and regulations of the United States Land Department are as follows:

10 Certificate to the State of Arkansas (who is not sued nor made defendant herein) confirming its selection of the W. $\frac{1}{2}$ of sec. 3 and the N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of section 10 under an act of Congress entitled "An act supplementary to an act for the admission of the State of Arkansas into the Union," approved June

23rd, 1836, the 4th section of which authorized that State to select five sections of unappropriated lands within the State.

That the remainder of said lands were sold and patented to the purchasers or their assigns under an act of Congress entitled An act to revive the act entitled An act to grant pre-emption rights to settlers on the public domain, approved May 29th, 1830, by the 4th section of which it is provided that "the right of pre-emption shall not extend to any land which is reserved from sale by act of Congress, by order of the President, or which has been appropriated for any purpose whatsoever."

11 That said sales and patents were as follows: The S. E. fr'l ¼ of said section 33 (south of the river) was sold, December 14, 1883, to John McLain and Noah H. Bodgett (who are not sued) and patented to them on the 19th day of June, 1840.

Under the said "float" pre-emption act of 1830 and supplemental act of July 14th, 1832, the east half of the southeast quarter of fractional section 3 (south of Ark's river), 80 acres, was sold to Samuel Plummer and certificate No. 3549 issued by the register at Little Rock June 6th, 1838; the west fractional part (west Quapaw line) of the southwest fractional quarter of fractional section 2 (south Ark's river), $65\frac{68}{100}$ acres, was sold to George Harris and certificate No. 3550 issued by the register at Little Rock June 6th, 1838; the south fractional part (south Ark's river, west Quapaw line) of the northwest fractional quarter of fractional section 2 and the south fractional part (south Arkansas river) of the northeast fractional quarter of fractional section 3, $125\frac{65}{100}$ acres, was sold to Jack-

12 son Crain and Joel Crain and certificate No. 3552 issued by the register at Little Rock June 6th, 1838; the west half of the southeast quarter of section 3, 80 acres, was sold to Mary Louisa Imbeau and certificate No. 3554 issued by the register aforesaid June 7th, 1838, all being in township 1 north of the base line of range 12 west, 5th pr. meridian, Pulaski county, Arkansas, on which certificates patents were issued by the United States to their common assignee, Roswell Beebe, on the 25th of September, 1839; and the west fractional part (west Quapaw line) of the northwest quarter of section 11, $65\frac{88}{100}$ acres, also in said township & range, county & State, was sold to Baptiste Bonne and certificate No. 3556 issued by said register June 7th, 1838, and also afterwards patented to said Roswell Beebe, his assignee, on the 30th of October, 1838. True exemplifications of said Beebe patents and said certificates are herewith filed, marked Exhibits G, G^1, G^2, G^3, G^4, &c.

That said certificates under said "float" pre-emption acts

13 embraced part of the same lands which had long prior, as hereinbefore set forth, been located under said New Madrid certificates. Hundreds of settlers resided upon them, claiming title under said New Madrid certificates. A town had long before been laid out and built thereon and duly incorporated, and said floats were located on whole acres of farms and houses.

That at the time of the location of said pre-emption float certificates and of the sales and issuance of said Beebe patents none of said lands were unappropriated within the meaning of said acts of

Congress under which they were professedly made, all of said lands having been appropriated as aforesaid by the location, surveys, and returns thereof under said New Madrid certificates and said Beebe patents, and the certificates and locations upon which they were made were allowed and issued under a misconception of and wrong construction of and without any authority of law, and are null and void.

14 They are void for the reason that said lands were occupied and improved by actual settlers and were not subject to pre-emption or sale under said floats, because said floats were located on whole acres of farms and houses and upon lands upon which was laid out and built an incorporated town, and such locations, certificates, and patents were a fraud upon the United States and upon the heirs of Philbrook and other settlers and claimants whose consent to the location of said floats and the issuance of said Beebe patents was never obtained, as required and provided by the act of Congress and the rules and regulations of the Land Department of the United States as embodied in the circular of the United States Land Office of October 11th, 1837 (see Exhibit "H," herewith filed), and others.

That said Roswell Beebe, to whom said unlawful and void patents were issued, and one Chester Ashley, and others to your orator

15 unknown, conspired and colluded together unlawfully and fraudulently to secure the location of said floats or certificates and the issuance of said patents thereon to said Beebe under an agreement to divide the spoils (said lands), which was afterwards carried out, and by false representations, pretences, and undue influences persuaded and coerced the register at Little Rock to believe that said Beebe had complied with the directions in the circular issued by the Land Department of the United States, dated Oct. 11th, 1837 (an exemplification of which is herewith filed, marked Exhibit "H," and prayed to be taken as part hereto), requiring the written consent of all settlers upon said lands to be filed when such lands were applied for and attempted to be located under such pre-emption certificates when they had not in fact so obtained such consent, and further pretending and misrepresenting that these floats were located to secure the title to the holders of the New Madrid certificates, when such location was in reality a scheme

16 to defraud such holders and your orator and procure said lands for their own gain; and said Beebe, in furtherance of said conspiracy and scheme, entered into a so-called bond to convey to the original holders and claimants of said lands the title he should acquire by the issuance of said patents on said floats, which he afterwards fraudulently failed and refused so to do; all of which was a fraud upon the United States and the other claimants to and settlers upon said lands; all of which will more fully appear, reference being had to exemplifications of the opinion of Hon. J. Whitcomb, com'r &c., and of the letter of the register & receiver at Little Rock, and of the bond of said Beebe, and other letters and documents in reference thereto herewith filed and marked Exhibits I, I^1, I^2, I^3, I^4, I^5, &c.

That all defects of the said New Madrid act and of the locations

thereunder have been cured by subsequent acts of Congress,
17 and the opinions of the Attorney General and decisions of the Department in reference thereto and in reference to the location of said floats have been overruled by later and better opinions and decisions of the Department and by decisions of the Supreme Court of the United States construing the same; and your orator avers that said locations of said floats and the issuance of said Beebe patents were allowed under a misconception of the law, procured by undue means and in violation of the law, and the same are null and void and ought in equity and good conscience to be cancelled.

That said Roswell Beebe died on the 21st of September, 1856, leaving him surviving Roswell C. Beebe, his son; Chas. W. Beebe, his son; Emma Beebe, his daughter, now Martin and wife of defendant, Joseph W. Martin; Cora W. Beebe, his daughter, afterward intermarried with John W. Faust and now deceased, his sole heirs-at-law, and Julia Beebe, his widow, who subsequently inter-
18 married with defendant, Thomas Frazer, and now deceased.

That Roswell C. Beebe died on the — day of ——, 18—, leaving him surviving Heartwell Beebe his sole heir.

That Cora F. Faust, formerly Beebe, died on the — day of ——, 18—, leaving her surviving defendants Kate, Emma, John, Fannie, Roswell, and Henry Faust, her sole heirs-at-law, all minors.

That Julia Frazer, widow of Roswell Beebe, died on the — day of ——, 188–, leaving her surviving Julia Frazer, a minor, —— ——, her sole heir-at-law.

That on the death of said Roswell Beebe his heirs inherited from him large portions of said lands described, much of which they still claim and own and are still in possession of.

That the administration of said Roswell has long since been closed up and the property divided among his said heirs.

19 To the end, therefore, that your orator may do justice and equity to all claimants and settlers claiming any of said lands whose equities are superior to those of said Roswell and his heirs, and fulfil her prior obligations, by issuing lawful patents to those justly and equitably entitled thereto, if any there be, or, if not, that the rights of your orator to said lands may be protected and enforced, and inasmuch as she is remediless in a court of law, your orator prays process by subpœna against all of said defendants; process by publication against said non-resident defendants and all other persons interested in or in possession of said lands who are unknown to your orator; that guardians *ad litem* be appointed to defend for said minors and attorneys *ad litem* for said non-residents should they fail to appear; that said certificates and patents so unlawfully issued to said Roswell Beebe be cancelled, set aside, held for naught, and ordered to be surrendered, excepting any lands owned or occu-
20 pied by the United States for any purpose, and all lands which the United States claims under any title besides that stated in this bill, and particularly the south half of block (98) ninety-eight, city of Little Rock, upon which the U. S. court-house and post office is situated, and that said defendants and all others who

may appear or intervene in this suit be divested of all title or claim arising under said Beebe patents to the lands embraced therein and be vested in your orator, and for all other and proper relief as if specifically prayed.

BENJAMIN HARRIS BREWSTER,
Attorney General.

By CHARLES C. WATERS,
U. S. Attorney, as per Letter of Instructions Attached Hereto.

LIBERTY BARTLETT,
Of Counsel for Complainant,
with Cummings & Baker, of Washington.

UNITED STATES OF AMERICA, *District of Columbia:*

I, Horace S. Cummings, do solemnly swear that I am of
21 counsel for complainant, and that the facts stated of my own knowledge in the foregoing complaint are true, and those stated on information and belief I believe to be true, so help me God.

HORACE S. CUMMINGS.

Sworn to and subscribed before me this seventh day of October, 1882.

In testimony whereof I hereto set my hand as such notary public and my seal of office this seventh day of October, 1882.

[SEAL.] JAMES CORSON,
Notary Public.

I, Liberty Bartlett, attorney for petitioners, bind myself to pay the cost as usual, and hereby offer to pay the plaintiff's costs in advance as it occurs.

LIBERTY BARTLETT.

22 A. R. D.

DEPARTMENT OF JUSTICE,
WASHINGTON, *June* 7, 1882.

Chas. C. Waters, Esq., U. S. district attorney, Little Rock, Arks.:

SIR: I transmit herewith printed copies of papers in the case presented to this Department Dec. 1, 1879, by Messrs. Cummings & Baker, attorneys for George V. Dietrich, Jabez V. Hunt, and John F. Colder, trustees for the heirs of Nathaniel Philbrook, deceased.

These papers are—

1st. Letters of Messrs. Cummings & Baker, Dec. 1, 1879.

2. The petition of the trustees above named.

3. Report of Commissioner of Land Office, March 11, 1880.

4th. Copy of report of Commissioner, Oct. 14, 1876 (referred to in paper last named).

5. Letter of acting Secretary of the Interior, July 26, 1880.

23 The petitioners ask that suit be instituted by the United States to set aside the patent or patents for the lands described, and for proper relief in the premises.

You will carefully examine the case as it appears upon these papers in connection with any other evidence you may be able to obtain from records — the county where the lands lie or from the land office.

And, if upon such examination you are satisfied that the said patents were illegally and wrongfully issued, you will, when a bill in equity is presented to *to* you by the attorneys for said parties, the purpose of which is the cancellation of said patents (if you see no objection to the form of the said bill), sign my name thereto as Attorney General of the United States, and file the same in the proper court: Provided, however, That the said petitioners or their counsel file a bond with penalty satisfactory to yourself, indemnifying
24 the United States against all costs in the case.

After the suit is commenced the counsel for petitioners will have the conduct and management of the case, subject to a general supervision by yourself, to the end that the interests of the United States may suffer no detriment or be abused.

The bill should be drawn in the name of the Attorney General on behalf of the United States.

Very respectfully,

BREWSTER,
Attorney General.

25 *Copy of Petition and Order.*

WASHINGTON, D. C., *Oct. 25th*, 1882.

To the Honorable Benj. H. Brewster, Attorney Gen'l of the U. S.

SIR: As attorney for the heirs of Nathaniel Philbrook, deceased, we filed a petition in your Department for the cancellation of certain land patents erroneously and illegally issued to other parties.

This petition was referred to the General Land Office, and that office strongly and specifically requested the Attorney General to institute a suit "to obtain the cancellation or avoidance of the aforesaid patents which would lead to an equitable determination of the rights of the Philbrook heirs and those persons deriving title from the patents and to obtain a definate adjudication of many vexed questions that *has* arisen," &c.

The Secretary of the Interior also specifically asked that
26 the Attorney General institute such suit. You, upon an examination of the matter, on June 7th, 1882, instructed the U. S. dist. att'y at Little Rock to institute such suit, saying that the dist. att'y shall have supervision of the suit "to the end that the interests of the U. S. may suffer no detriment or be abused."

The dist. attorney has discovered what he did not know before, viz., that a portion of the land in question has been purchased by the U. S., and is now occupied by them. This fact we did not know before. The question arises, Will the Gov't be willing to submit to the legal adjudication of the title of the lands occupied by them, or shall the bill not yet filed be so framed as to exempt all lands now claimed by the U. S. Gov't? Had we been cognizant of the Gov't occupancy we should have exempted such lands thus occupied, and as the matter stands we are anxious to conform to the judgment and

wishes of the Dep't of Justice, and are willing either to have
27 the rights of the Gov't tested equally with those of private individuals or to "except the lands owned or occupied by the Gov't in our bill." We would most respectfully request the dist. att'y, Waters, be instructed what course to pursue.

Very respectfully,
(Signed) CUMMINGS & BAKER.

DEPARTMENT OF JUSTICE,
WASHINGTON, *Oct* 25, 1882.

Charles C. Waters, Esq., U. S. attorney, Little Rock, Ark.

SIR: Your letter of the 16th inst. relating to the claim of the heirs of Nathaniel Philbrook is rec'd. As touching point stated by you, to wit, that the bill as drawn includes lands occupied by the U. S., and upon which the Gov't has erected public buildings for a post office, &c., the attorneys for the Philbrook estate have addressed to this Department a letter, bearing date the 21st inst., submitting certain propositions. I enclose a copy of said letter. I think
28 it advisable, and you are hereby instructed, to amend the bill which has been presented to you so as to strike out from the claim of the trustees all lands occupied by the U. S. for any purpose and all lands which the U. S. claims under any title besides that stated in the bill. After you have so amended the bill it may be filed.

Hereafter all persons interested in the Philbrook estate will be required to give a deed of quitclaim and release to the Gov't for all the lands in the occupation of the Gov't. This they offer to do through their attorneys in Washington. Of course they will do it, for otherwise you will be instructed to dismiss the proceedings.

Very respectfully,
(Signed) BREWSTER,
Attorney General.

Endorsed: Filed January 31, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

29 And on January 31st, 1883, the following petition and motion for rule on the clerk was filed:

Petition and Motion for a Rule on the Clerk.

In the Circuit Court of the United States for the Eastern District of Arkansas.

THE UNITED STATES OF AMERICA, by Her Attorney General, Benjamin H. Brewster, Complainant,
against
CHARLES W. BEEBE *et al.*, Defendants.

Complaint in equity.

To the honorable judges of the circuit court of the United States of the eastern district of Arkansas:

Your petitioners herein, to wit, Geo. V. Deitrich and Jabez C. Hunt, citizens of Galesburg, Illinois, and John F. Colder, of Troy,

New York, the duly appointed and acting trustees for the heirs and devisees of Nathaniel Philbrook, deceased, and parties bene-
30 ficiaries herein, as set forth and shown in said plaintiff's bill of complaint, respectfully represent that in conformity with instructions and an order issued out of the Department of Justice at Washington, D. C., June 7th, 1882, on the petition of said trustees, asking that a suit in equity be instituted in the proper court by the United States to set aside patents to lands therein described wrongfully issued to said defendants, the same directed to C. C. Waters, U. S. attorney at Little Rock, here shown, attached to the said plaintiff's bill of complaint herein, directing that on a proper inquiry and finding, and a bill in equity is presented by the attorneys for said parties, and a satisfactory bond is filed by said petitioners, then to sign his name thereto—that is, Benjamin H. Brewster, Attorney General of the United States—and file the same in the proper court, and after the suit is commenced the counsel for the petitioners will have the control and management of the case, and finding
31 the lands & defendants within the jurisdiction of this court, and in compliance with said order, is held to be the proper court.

Your petitioners further represent that on compliance with said order and instructions, its conditions fully complied with, evidenced by said U. S. attorney, C. C. Waters, signing the name of Benjamin H. Brewster, Attorney General, to said bill, and attaching thereto his said letter of instructions and authority, together with a satisfactory bond approved, and 25 or more exhibits referred to and made parts of said bill, and on the 23rd day of November, 1882, filed the said bill of complaint, the 25 or more exhibits, and said approved bond in this honorable court, on the chancery side thereof, by delivering to the clerk of this court said bill of complaint, signed as aforesaid, the said approved bond and said exhibits as parts of said bill and demanded of the clerk to file the same in this court, that done and his duties therein ceased, and the attorney for
32 the said trustees here present would have control and management of the case.

Whereupon the attorney for petitioners, Liberty Bartlett, entered his appearance of record on said bill filed as aforesaid, and at the suggestion of said U. S. attorney, Judge Waters, he tendered $25.00, which was received and still held for the estimated fees for clerk service, and offered $35.00, the marshal's estimated fees for service of the court process, when issued, and stated in that presence that said trustees, beside the approved bond, had made a sufficient deposit in the Exchange Bank of this city subject to draft for all taxable cost, and to conform to the usual practice in this court in cases of non-resident plaintiffs, he, as attorney, in writing endorsed on said bill, bound himself to pay the costs in advance as they should accrue; in all appearing satisfactory, the said clerk proceeded to endorse upon said bill and bond and to stamp said
33 exhibits as in part said bill filed Nov. 23, '82, over the signature of R. L. Goodrich, clerk, &c., and, for their great number

and bulk, assigned said exhibits to said attorney till an appearance of a defendant.

And, further, in the performance of his duty as attorney and solicitor for said petitioners, at the commencement of the suit he called up said bill and proceeded, under rule 12 of this court, in these words: "Whenever a bill is filed the clerk shall issue the process of subpœna thereon as of course upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one at the election of the plaintiff," &c.; and, refer-ing to said bill filed as aforesaid, he informed the clerk as to the defendants therein named their condition and residence; and, for reason three, defendants were to be served in California, requiring much writing, the issue of subpœnas to the marshal might be deferred till the next Monday, Nov. 27th, but no longer,
34 and the time returnable the second rule day, it — the first Monday, in January, 1883; and the said clerk assenting thereto, he assigned the said bill to a private drawer, as if confidential, till said defendants were served, it being mentioned and understood as a rule that no one had a right to examine said bill, especially the exhibits (the reason they were turned over to said attorney), until one or more defendants entered an appearance.

The said attorney for petitioners, as in duty bound, carefuliy scrutinized the actors, their duties enjoined, and that every step therein conformed to special instructions referred to and the rules governing in this court, so as to lawfully and of right to enter therein, and a like design and the utmost good faith appeared all the way traversed over said order and instructions by said U. S. attorney, C. C. Waters, and the clerk of this court.

They knew they had so impressed said attorney wherein he confided, advanced clerk fees, and incurred large personal lia-
35 bility, and from which cannot recede.

And, further, the said attorney for petitioners received in June last a printed copy of the said order and instructions from the Attorney General to Dist. Attorney Waters directing him to carefully examine the case, "and, if satisfied that the said patents were illegally and wrongfully issued, you will sign," &c.; said attorney took it as well addressed to himself, and that he, too, would carefully examine the case, and, if found without legal or just merit, he would ask leave to retire from the case; and to aid in the inquiry submitted to Judge Waters the printed argument of the defendants' learned attorney, Senator Garland, delivered before the Land Dep't, in Washington, D. C., in 1877, presenting in the strongest light adverse to the validity of the Philbrook claim—so called; that argument was carefully examined by both, and the fact revealed that near half of the Government post-office building was on the
36 land in question, which Judge Waters reported to the Attorney Gen'l and asked for further instructions, and the merits of the case *was* further discussed before him.

Whereupon U. S. Attorney Waters was relieved from further inquiry by Att'y Gen. Brewster directing him to amend the bill in one particular, then to sign his name to the bill, which he did do, as ap-

pears written on the margin, and the said signature attached thereto, and on filing the bill as aforesaid his control over it came to an end, as he very properly said to the clerk.

And, further, on the careful review of said argument found therein set forth and claimed, that the proper action for said petitions was a proceeding in the name of the United States to set aside the patents wrongfully issued, and no showing that would justify a withdrawal from the case, and to treat properly for former positions in November, 1881, the said attorney, Bartlett, informed, in writing,
37 the first-named defendant, Charles W. Beebe, of California, holding one-fourth interest in said lands; that he was employed as attorney therein and in the preparation of a suit in an equity court, and referred to several reports made by heads of dep'ts examined at Washington, D. C., alleging fraud in procuring patents for the lands in question, and thereby open a way for him to appear and defend his deceased father, if he could, against alleged crookedness in procuring the "Beebe patents;" that his position therein was not of his own seeking, but made for a reputation for faithful service as attorney gained in Washington, D. C., and such inducements offered as rendered it a duty to undertake therein.

And the said petitioners, while instructing said clerk as hereinbefore stated, — special mention was made of residence, &c., in California, and mode of service on said Beebe, and an increased fee demanded therefor and paid, and more offered, if required, on
38 return of service, and yet the said clerk, R. L. Goodrich, has wholly neglected and refused to issue subpœnas against said defendants.

Further, while the said order and -structions were being considered, petitioners were advised of said U. S. attorney, C. C. Waters, leaving a copy thereof with said clerk, in advance of filing the bill, and petitioners' said attorney, mindful of the desperate wickedness of the human heart—prone to sharp practice—and the duty of a district attorney to forecast as in procuring service on a party in failing circumstances, *he* requested the said clerk to treat the said paper as confidential till further proceedings were had, for the order seemed to contemplate an *ex parte* action, which was assented to by said clerk, and so treated, when, as aforesaid, he placed the bill after filing in a private drawer as a sacred trust, till a defendant entered an appearance, called by the court's process; but the said order and
39 authority of Att'y General Brewster in assigning the control and management of the case to the attorneys of petitioners has been overcome, frustrated, and put at naught by a ministerial officer of this court, who, on the day following the aforesaid preliminary steps in the judicial management of the case, parted with his careful custody and keeping of said bill, giving it out to parties who had no legal right thereto whatever, and permitting himself, without notice to petitioners, to be overcome with local prejudice and intimidation, to violate the aforesaid rule of this court, to desist and refuse to issue said subpœnas, according to law, and a special agreement for fees in advance and still held, whereby the clerk of this court assumed official duties to perform as of course,

which to neglect or refuse to do puts at defiance the authority of the United States, as expressed through the Department of Justice, and works a denial of the just and lawful rights of said trustees, acquired through said departmental order; and your peti-
40 tioners are without remedy, except by a rule on said clerk to issue subpœnas as aforesaid.

Motion.

Motion for a rule on the clerk.

To the Honorable Geo. W. McCrary, judge of the circuit court of the United States for the eastern district of Arkansas, at chambers:

Wherefore the premises considered as hereinbefore set out and alleged, your petitioners, to wit, Geo. V. Deitrich and Jabez C. Hunt, citizens of Galesburg, Illinois, and Jno. F. Colder, citizen of Troy, New York, trustees, &c., by their attorney, Liberty Bartlett, authorized to conduct and manage the case herein, and in the further prosecution thereof beg leave to submit a motion, as at chambers, for a rule on Ralph L. Goodrich, clerk of this honorable court, directing and requiring said clerk to forthwith issue, in due form of law
41 and the rules of this court, the court process of subpœna, directed to the defendants charged in the said plaintiff's bill of complaint, the same on file in the office of the clerk of this court, and made of record on the 23 day of November, 1882, by the plaintiff in said entitled cause, in manner and form as hereinbefore set forth and alleged—said defendants, to wit, Charles W. Beebe, Thomas Frazer and Julia Frazer, a minor of the State of Cal., Joseph W. Martin, Hartwell Beebe, a minor, and William C. Ratcliffe, guardian of Kate, Emma, John, Fannie, Roswell and Henry Faust, minors, and that said subpœnas shall be made returnable on the second rule day after issue, and that said clerk shall place to the bottom of the subpœnas, as elected by the plaintiff, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken "*pro confesso.*"

All of which said petition and above motion are respect-
42 fully submitted.

LIBERTY BARTLETT,
Attorney & Solicitor for Trustees & Petitioners.

The Foregoing Petition & Motion Amplified.

Your petitioners, by their said attorney, Liberty Bartlett, beg leave further to state, in connection with said petition and motion, and held as parts of the same, that on said U. S. Attorney C. C. Waters filing said bill of complaint, 25 or more exhibits made parts of the bill, the approved bond, as the end of his duties, and announced to the clerk that petitioners' attorney, Bartlett, then present, would thenceforward have the control and management of the case, and the clerk received and proceeded to write on the backs of the same, said attorney believed to be the usual notice of filing, dat-, &c., when it ap-

peared afterward to have been the title of the case here shown, that made, then held to come back with the usual stamp to make the filing; the clerk then took up his stamp, changed the date
43 to Nov. 23, and stamped filed the said exhibits, and by oversight omitted to make the filing, but proceeded to take directions as "after the filing of the bill," and on consulting and as advised the clerk, as appears in the bill, struck out seventeen names of defendants for service at another time, if deemed necessary parties to the suit, leaving eleven to be served, agreeing to issue the subpœnas on Monday next, the 27th Nov., giving three working days to prepare long papers pretended for service in California and making a calculation on clerk fees found to be $25.00 and paid as aforesaid and still held, and the said clerk made an entry in a book if it was not a record of the filing of said bill; the clerk gave said attorney having the control and mangement of the case reason to believe it was, and that said attorney had performed each and every act required by law and the rules of this court to have made
44 a record as of a suit commenced and properly in court awaiting the court process. The said clerk intended and induced said attorney to believe that the bill was legally filed before it was stamped, which is simply the evidence of filing. Any other conclusion would impute deception and fraud on the clerk. Otherwise the omission to stamp said bill filed was intended by said clerk to deceive said attorney and the court, and under a pretense to deny said petitioners the proper legal process of this court, conditioned as aforesaid, the day following the said clerk informed the adversaries of the bill of its filing and suffered himself to be so intimidated, influenced, and overruled as to hold that his pretended omission to stamp said bill filed, &c., that it was not in law filed, assuming to decide a judicial question without notice or to permit a hearing, and continuously thereafter to neglect and refuse to perform his well-known official duty and in violation of a special contract paid for to issue eleven of the court process of subpœna to the defend-
45 ants therein named, and as far as in him lies to wrongfully eject your petitioners from the portals of this honorable court, wherein by special act it is declared as a court of equity it shall be deemed always open for filing bills, pleadings, &c. Bump, Federal Procedure, sec. 638; same under rule 1 and rule 12 of this court.

Wherefore your petitioners, as parties beneficiaries in said suit, have no remedy except by appearing before the hon. circuit judge of said eastern dist. of Arkansas, as at chambers, and present the aforesaid petition and motion for a rule or order requiring the said clerk to perform his duty and issue the subpœnas therein mentioned, the district judge, the Hon. H. C. Caldwell, being by law wholly disqualified to act therein for reason of interest, as shown by a certified copy of his affidavit hereto attached.

It was further agreed with said clerk, Ralph L. Goodrich,
46 after inquiry and finding the marshal's fee for service of ten defendants, three in California, to be $35.00, and the said clerk agreeing to make and deliver to the marshal on Monday, the 27th day of November, the said subpœnas, that your petitioners, by said

attorney, offered the said $35.00 in advance to said clerk, and the receiving delayed for the time the said attorney made a deposit of the same in the Exchange Bank, and to effect that duty performed by said clerk and the special contract carried out the said attorney for petitioners hereby tenders his certified check on the said Exchange Bank of Little Rock *o*for the said deposit of 35.00, and moves on the honorable circuit judge, Geo. W. McCrary, at chambers, to make this further order on said clerk and direct him to endorse on said bill in writing: Filed November 23rd, 1882; signed, R. L. Goodrich, clerk—to correspond with the filing stamped upon all the exhibits and papers made parts of said bill, and as directed by the
47 order and instructions of Attorney General Brewster thereto attached by U. S. Attorney C. C. Waters. That done, then further to direct said clerk to issue said subpœnas as elected by the plaintiff and deliver the same to James Torrans, the marshal of said court, accompanying the same with said certified check for $35.00 for the deposit agreed upon with said clerk; who afterwards, the fourth day thereafter, demanded of said attorney, Bartlett, a return of said exhibits and papers, that he might erase the filing thereon so as to correspond with a future date; to which said attorney declined to accede, asserting his right to stand upon the date and filing already made of record, and await a judicial ruling thereon, if compelled to do so by the persistent refusal of the clerk to perform his plain duty "as of course."

Now, on review of the premises, thus fairly and truthfully stated, and the surroundings, the said attorney for petitioners has reason to believe and does believe that said clerk, R. L. Goodrich, has
48 been approached by your petitioners' adversaries with an undue and improper influence, prompted by local prejudice, to overawe and intimidate the said clerk to avoid and desist the performance of his official duty and to prevent your petitioners having their just rights ever tried in this honorable court.

Wherefore they move and pray as herein set forth, and will ever pray.

LIBERTY BARTLETT,
Attorney & Solicitor for Trustees & Petitioners.

And the said attorney for petitioners, Bartlett, further states that he read the foregoing petition and motion, except the last three pages, in the presence and hearing of said U. S. Attorney C. C. Waters, and he made objection to one word only as incorrect; that was in lieu of "filing" to say handed or leaving the clerk a copy of the Attorney General's order and instructions, which correction
49 was accordingly made, which occurs on the 5th page and 6th line of said petition.

STATE OF ARKANSAS, *County of Pulaski:*

I, Liberty Bartlett, do solemnly swear that I am of counsel for said petitioners, who are absent from the State, and that the matters and things therein stated and alleged are true according to my best knowledge and belief, so help me God.

LIBERTY BARTLETT.

Sworn to and subscribed before me this 23rd day of December, 1882.

In testimony whereof I set my hand as such notary public and my seal of office this twenty-third day of December, 1882.

[SEAL.] N. W. COX,
Notary Public.,

Upon which petition and motion for rule on clerk the following endorsement appears:

Ordered that the clerk issue subpœnas in this case or show
50 cause before me at my chambers in Keokuk, Iowa, on or before February 1st, why he should not do so.

Keokuk, Jan'y 3, 1883.

GEO. W. McCRARY,
Circuit Judge.

If the bill has not been filed the clerk will file it or show cause as above.

GEO. W. McCRARY, *Judge.*

Endorsed: Filed January 31, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

51 *Response of Clerk to Rule.*

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

In the matter of the order to the clerk to show cause, &c.

Comes Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, and for answer to the rule upon him granted by the Hon. George W. McCrary, circuit judge, on the 3rd day of January, 1883, at chambers, says that said rule was not shown to him, and he was ignorant of its existence, until after business hours on the 25th day of January, 1883.

And, further answering the said rule, he says that all he
52 did in and about the said cause was done under the directions of the Hon. C. C. Waters, United States district attorney for this district; that said district attorney handed said papers to the respondent, but neither the said district attorney nor any one else filed a written precipe or gave a verbal order for process to issue in said cause, and before said cause was docketed or any process issued therein said district attorney withdrew all the papers from respondent's custody and possession and forbid any process to issue thereon, and said papers since that time have never been in respondent's office or seen by him until last night. No process was ever ordered by the district attorney or Mr. Bartlett while the papers remained in respondent's office.

Respondent attaches hereto and makes part of this return a

certified copy of a written precipe now on file in his office,
53 signed by the district attorney, relating to said case, and which states accurately the verbal orders and directions of said officer given at the time.

Respondent, further answering, says he referred Mr. Bartlett's communication and motion and the rule granted thereon to the district attorney and the letter of said district attorney in answer thereto, together with a copy of the letter from that officer to the Attorney General of the United States, relating to this matter and hereto attached and made a part of this return.

After the district attorney withdrew from respondent's custody the bill and exhibits and stated to respondent said suit would not be brought and no process issued therein the respondent notified Mr. Bartlett of the fact and tendered him the twenty-five
54 dollars deposited to pay fees, which he declined to receive, and so said sum remains subject to Mr. Bartlett's order.

Having stated the facts, the respondent is ready and willing to conform to any order or direction the hon. circuit judge may give in the premises.

RALPH L. GOODRICH,
Clerk U. S. Circuit Court, East. Dist. Ark's.

Subscribed and sworn to before me this 26th day of January, 1883.

HENRY C. CALDWELL,
U. S. Dist. Judge.

55 *Letter of U. S. Attorney.*

LITTLE ROCK, ARK., *Jan'y 26th*, 1883.

Hon. Geo. W. McCrary, U. S. circuit judge, Keokuk, Iowa.

DEAR SIR: The long communication of Liberty Bartlett, Esq., with his motion for a rule on the clerk and your order thereon in the Philbrook heirs case, has been referred to me by that officer.

The whole of Mr. Bartlett's communication can be answered in a few words.

The bill was improvidently and prematurely tendered by me to the clerk for filing, but was afterwards withdrawn from the clerk's office by me and all proceedings in that behalf abandoned. There is, therefore, no bill duly filed and there has never been. Upon further examination, becoming satisfied that under the instruc-
56 tions of the Attorney General to me the suit ought not to be instituted in the name of the United States, I declined to commence the suit or file the papers with the clerk for that purpose, and withdrew them from his custody before any writs issued or had been ordered.

I wrote the Attorney General of the United States my reasons for declining to file said papers, a copy of which letter is hereto appended, and have received no further instructions from him on the subject, though I am unofficially advised application has been made

to that officer to give an order for filing said bill in the name of the United States or instruct me peremptorily to file the same, and that said officer has thus far declined to comply with said request.

If a rule is to go against any one to compel the commence-
57 ment of the suit in the name of the United States it would seem that it ought to go against the Attorney General, and not against the clerk of this court, who certainly has no power to do any such thing over the objections of the proper officers of the Government.

Very respectfully, CHARLES C. WATERS,
U. S. Attorney.

Subscribed & sworn to before me this 26th Jan'y, 1883.
RALPH L. GOODRICH, *Clerk.*

58 *Precipe.*

LITTLE ROCK, ARK., *Jan'y* 26, 1883.

Ralph L. Goodrich, Esq., clerk U. S. court.

SIR: You are hereby instructed to issue no process upon any bill alleged to be filed in the matter of Philbrook heirs in the name of the United States.

No such bill is filed by myself or attorney general nor has issuance of any process ever been directed by me.

You will regard this precipe as relating to the time when I withdrew the bill from your custody.

Respectfully, CHARLES C. WATERS,
U. S. Attorney.

59 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this 26th day of January, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and seventh.

Attest: [SEAL.] RALPH GOODRICH, *Clerk.*

60 *Letter of U. S. Attorney to Attorney General.*

LITTLE ROCK, ARKANSAS, *Dec. 15th*, 1882.

Hon. Benjamin H. Brewster, Attorney General, Washington, D. C.

SIR: I have the honor to submit the following report:

Referring to your letter of instructions to me of date June 7th, 1882, in reference to claim of Philbrook heirs to a portion of the city of Little Rock, I extract the following: "You will carefully examine

the case as it appears upon these papers in connection with any other evidence you may be able to obtain from records in the county where the lands lie or from the Land Office and if, upon examination, you are satisfied that the said patents were illegally and
61 wrongfully issued you will, when a bill in equity is presented to you by the attorneys for the said parties, the purpose of which is the cancellation of said patents (if you see no objection to the form of said bill), sign my name thereto as Attorney General of the United States and file the same in the proper court."

In compliance with these instructions I have made such examination as my other official duties would permit, and the result is that I am not satisfied that the patents referred to were illegally and wrongfully issued. I can further elaborate this branch of the subject hereafter if desired.

Aside, however, from the merits of the Philbrook title I desire — submit some views on other aspects of the proceeding here contemplated.

In my opinion it is doubtful whether the United States
62 can properly proceed by bill in equity to obtain cancellation of patent alleged to have been erroneously or fraudulently issued, except where the United States is itself the real party in interest.

As I understand the law, the United States cannot properly undertake such proceeding to settle a controversy about title between private citizens. Their remedies are ample in the courts in their own right. For a recent exposition of this doctrine by the Supreme Court of the United States see United States *vs.* Schurz, 12 Otto, p. 404. The Court says:

"On the other hand, when he obtains this possession (of the patent), if there be any equitable reason why, as against the Government, he should not have it—if it has been issued without authority of law or by mistake of facts or by fraud of the grantee—the
63 United States can, by a bill in chancery, have a decree annulling the patents, or possibly a writ of *scire facias.* If another party or the city of Grantsville is, for any of the reasons cognizable in a court of equity, entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession or perhaps before."

See also to same effect Moore *vs.* Robbins, 6 Otto, p. 533: "These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals, and if the Government is the party injured this is the proper course." Further on: "If an individual setting up claim to the land has been injured he may, under circumstances presently to be consid-
64 ered, have his remedy against the party who has wrongfully obtained the title which should have gone to him."

From which it appears that when "the Government" is affected by wrongful issuance of patents then the United States may by bill in equity obtain cancellation of the same, but if "another party" is so affected then such other party is remitted to an ordinary action

in the courts. And where a private citizen shows successfully in the proper tribunal that a patent issued to another ought equitably to have issued to him, then the courts will hold the patentee a trustee for his benefit, and will direct the patentee to convey the title to him. This is just what the Supreme Court of the United States ordered to be done in Cunningham *v.* Ashley, 14 How-
65 ard, p. 389–'90. This course was open to Philbrook and heirs and is yet open, for ought that I know to the contrary.

At an early day in the history of the Government there was some confusion as to the proper practice which should prevail in this class of cases, and cases may be found where the Government has sanctioned such a proceeding in the interest of the equitable owner; but no such sanction was ever given in a case like this. It was only done in cases where equitable owner or his representatives were active and diligent in the assertion of their rights, and before rights of third parties had attached or lapse of time had made it difficult or impossible for all the facts to be shown.

If, however, I am in error in this position and the United States may lawfully, if it shall elect to do so, move in behalf of a
66 citizen for the cancellation of a patent once issued, then the question arises, Under what circumstances shall the Government exercise this power? Clearly no citizen can demand that the Government shall do this in his behalf as a matter of strict right. If the United States shall elect to do so in a particular instance it is merely an act of grace; it is merely in the exercise of a discretion to act or not to act, as to it shall seem meet and proper under all the circumstances of that case. With this *this* proposition in view, we then reach the inquiry, Is the case presented here a proper case in which the Government should take this special and extraordinary step? I am clearly of the opinion that this case is not one in which the Government should move in the manner suggested.

67 The claim of the Philbrook heirs covers upwards of one-fourth of the present city of Little Rock, in its most populous quarter. Real estate men inform me that the valuation of the lands affected is about $1,000,000. The lands are not held by a few men, but are distributed among hundreds of persons, who occupy them as their homes.

The patents sought to be cancelled were issued in 1838, '39, '40. Since then, until at a comparatively recent date, no attempt has been made by Philbrook heirs to assert their claim. The present owners of these lands and their granters and ancestors have held them for forty years—more than a generation—supposing their title to be valid. Some of the issues of fact to be sprung if this litigation —
68 opened are now difficult, probably impossible, of exact ascertainment, as material witnesses to the controversy are dead; so that a great calamity would befall the innocent if this suit should be pressed, and incidentally, no matter what the final outcome of the suit may be, a misfortune of almost equal gravity is suffered. During the pendency of the litigation values of the real estate effected are utterly unsettled; loans cannot be effected thereupon, transfers cannot occur except at ruinous and merely specula-

tive figures, and this state of things would continue indefinitely through a long, protracted, expensive, and fiercely litigated controversy.

Is there any corresponding suffering that will bear comparison for a moment if the United States shall decline to bring this action? I apprehend not.

69 I therefore respectfully recommend that no steps be taken by the United States on behalf of the Philbrook heirs to aid them in the assertion of their title.

I respectfully submit the above views and recommendations for your consideration and action.

If, in your opinion, I am wrong, I shall cheerfully and earnestly endeavor to carry out any instructions you may give in the premises.

I have mailed a copy of this letter to Senator Garland and have also handed a copy to Hon. Liberty Bartlett, of counsel for Philbrook heirs.

Very respectfully, CHARLES C. WATERS,
U. S. Attorney.

On which response of clerk to the rule the following endorsement appears:

70 The return of the clerk in this case is considered sufficient and the rule is discharged. The district attorney, under instructions from the Attorney General, may determine whether to prosecute the suit in the name of the United States or not.

Keokuk, Jan'y 29th, 1883.

GEO. W. McCRARY.

71 And on January 31, 1883, the following bond of indemnity to the United States against costs was filed, to wit:

72 *Security for Costs.*

In the Circuit Court of the United States, Eastern District of Arkansas.

THE UNITED STATES OF AMERICA, by Her Attorney General, &c.,

v.

CHARLES W. BEEBE *et al.*

We acknowledge ourselves to owe and be indebted to the United States in the full and just sum of one thousand dollars, for the payment of which we bind ourselves, our heirs, executors, administrators, &c., firmly by these presents.

Witness our hands and seals this the 23d day of October, A. D. 1882.

But this obligation to be void if we pay all costs for which the United States may be liable in the above-entitled suit.

G. V. DIETERICH. [SEAL.]
JABEZ C. HUNT. [SEAL.]
J. W. HAMMOND. [SEAL.]

73 STATE OF ILLINOIS, *County of Knox:*

I, G. V. Dieterich, do solemnly swear that I am worth the sum of one thousand dollars in property subject to execution, over and above my just liabilities and exemptions, so help me God.

G. V. DIETERICH.

Sworn to and subscribed before me this 23d day of October, 1882.

[SEAL.] JAMES H. CALKINS,
Notary Public.

STATE OF ILLINOIS, *County of Knox:*

I, Jabez C. Hunt, do solemnly swear that I am worth the sum of one thousand dollars in property subject to execution, over and above all my just liabilities and exemptions, so help me God.

JABEZ C. HUNT.

Sworn to and subscribed before me this 23d day of Oct'r, 1882.

[SEAL.] JAMES H. CALKINS,
Notary Public.

74 On which bond the following endorsement appears, to wit:

LITTLE ROCK, ARKANSAS, *Nov. 27th*, 1882.

The within bond is approved by me as a proper bond of indemnity to the United States against costs, as contemplated by letter of instructions from Dep't of Justice to me, of date June 7th, 1882, attached to the bill. I am of opinion, however, that no costs are properly taxable against the United States in this proceeding, and therefore I am further of opinion that the officers of the court may properly require the contemplated beneficiaries under this proceeding to satisfy them as to costs by advance deposits in cash in reasonable sums or by bond for costs, or both, as they may elect.

CHARLES C. WATERS,
United States Attorney, East. Dist. of Arkansas.

Endorsed: Filed January 31, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

75 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas begun and holden on Monday, the 23rd day of October, anno Domini one thousand eight hundred and eighty-two, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on February 27, 1883:

UNITED STATES
v. } 520.
CHARLES W. BEEBE *et al.*

Came on this day the defendant, Joseph W. Martin, by Rose, Williams and Moore, Esqs., his solicitors, and files his motion to require

the plaintiffs to file the exhibits referred to in the original bill herein, and to require the persons for whose use this suit is brought to file a bond for costs; and thereupon Henry C. Caldwell, district judge of this court, declares himself to be disqualified from sitting as a
76 judge in this cause by reason of the fact that he is personally interested in the subject-matter of the litigation.

Which motion to require plaintiff to file exhibits is as follows, to wit:

In the United States Circuit Court for the Eastern District of Arkansas.

UNITED STATES, Plaintiff, *vs.* CHARLES W. BEEBE *et al.*

Comes the defendant, Joseph W. Martin, and prays that the plaintiff may be required to file here the exhibits referred to in the original bill herein.

U. M. & G. B. ROSE.
J. W. MARTIN.
J. M. MOORE.
S. W. WILLIAMS.

Endorsed: Filed Feb'y 27, '83. Ralph L. Goodrich, clerk.

Which motion for bond for costs is as follows:

77 U. S. C't C't, E. Dist. Ark.

UNITED STATES, Plaintiff, *v.* CHARLES W. BEEBE *et al.*, Defendants.

Comes said defendant, Joseph W. Martin, and moves the court to require the persons for whose use this suit is brought to file a bond for costs herein.

J. W. MARTIN.
U. M. & G. B. ROSE.
MOORE.
WILLIAMS.

Endorsed: Filed Feb'y 27, '83. Ralph L. Goodrich, clerk.

And on March 5, 1883, the following proceedings were had, to wit:

UNITED STATES
v.
CHARLES W. BEEBE *et al.* } 520.

Come the defendants, Joseph W. Martin and Emma Martin,
78 his wife, by U. M. & G. B. Rose, J. M. Moore, and Clark and Williams, Esqs., their solicitors, and file herein their demurrer to the bill of complaint; and comes the defendant, W. C. Ratcliffe, as administrator, by said solicitors, and file- herein his plea; and comes Kate Faust, by W. C. Ratcliffe, her guardian, and files

her motion to dismiss, and the said defendant, Joseph W. Martin, by his said solicitor, files herein his motion to compel the complainant to file the following exhibits to her bill, viz., Exhibits "A," "C^3," "C^4," "F," "G," "G^1," "G^2," "G^3," "G^4," "I^1," "I^3," "I^4," & "I^5."

Which demurrer is as follows:

79 In the United States Circuit Court for the Eastern District of Arkansas. In Chancery.

THE UNITED STATES OF AMERICA, Plaintiff,

v.

CHARLES W. BEEBE *et al.*, Defendants.

Come the defendants, Joseph W. Martin and Emma Martin, his wife, and demur to the original bill herein, and for cause of demurrer they say—

1. It appears from the face of said bill that the plaintiff has no equity to maintain this suit.

2. It also appears that the plaintiff has no interest in the prosecution of this suit, and that if it has any interest in the subject-matter of this suit it is one in common with that of the defendants named therein.

3. It appears from the face of the bill that the claim sued upon is stale and such as a court of equity will not enforce.

4. It appears that there are many persons who live on the
80 lands described in the bill who are not made defendants thereto.

U. M. & G. B. ROSE,
J. M. MOORE,
CLARK & WILLIAMS, *Sol's.*

I, Joseph W. Martin, say that the foregoing demurrer is not interposed for delay.

JOSEPH W. MARTIN.

Sworn to & subscribed before me March 5, 1883.
RALPH L. GOODRICH, *Clerk.*

In our opinion, the foregoing demurrer is well founded in point of law.
March 5, 1883.

U. M. & G. B. ROSE.
CLARK & WILLIAMS.
J. M. MOORE.

Endorsed: Filed M'ch 5, '83. Ralph L. Goodrich, clerk.

Which plea is as follows:

81 In the United States Circuit Court for the Eastern District of Arkansas.

UNITED STATES, Plaintiff,
v.
CHARLES W. BEEBE *et al.*, Defendants.

Comes the defendant, William C. Ratcliffe, as administrator of Cora F. Faust, and for cause of plea herein, which he here interposes, he says that the following persons, among others, are living on the lands described in said bill none of whom are made parties to said bill, that is to say:

* * * * * * *

Wherefore this defendant prays that he maybe hence dismissed with his reasonable costs.

U. M. & G. B. ROSE.
CLARK & WILLIAMS.
J. M. MOORE.

I, William C. Ratcliffe, say that the forgoing plea is true in
82 point of fact, and that it is not interposed for delay.

W. C. RATCLIFFE.

Sworn to & subscribed before me this 5th March, 1883.
RALPH L. GOODRICH, *Clerk.*

In our opinion, the foregoing plea is well founded in point of law. March 5, 1883.

U. M. & G. B. ROSE.
CLARK & WILLIAMS.
J. M. MOORE.

Endorsed: Filed M'ch 5 '83. Ralph L. Goodrich, clerk.

Which motion to dismiss is as follows, to wit:

United States Circuit Court for the Eastern District of Arkansas.

UNITED STATES, Plaintiff,
v.
CHARLES W. BEEBE *et al.*, Defendants.

Comes the defendant, Kate Faust, and moves the court here
83 to dismiss this suit, because it appears by the bill and exhibits herein that it is based on a stale claim, that in equity should not be enforced, and because it does not appear that the suit is prosecuted by the Attorney General of the United States.

U. M. & G. B. ROSE,
CLARK & WILLIAMS,
J. M. MOORE, *Sol's.*

Endorsed: Filed M'ch 5, '83. Ralph L. Goodrich, clerk.

Which motion to compel complainants to file exhibits is as follows, to wit:

United States Circuit Court, Eastern District Arkansas.

UNITED STATES *v.* CHAS. W. BEEBE *et al.*

Comes Joseph W. Martin, one of the defendants, and moves
84 the court to require the complainant to file the following exhibits to her bill, viz: Exhibits "A," "C^3," "C^4," "F," "G," "G^1," "G^2," "G^3," "G^4," "I^1," "I^3," "I^4," "I^5."

ROSE,
WILLIAMS &
MOORE, *Sol's.*

Endorsed: Filed M'ch 5, '83. Ralph L. Goodrich, clerk.

And on March 6th, 1883, the following proceedings were had, to wit:

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Comes the defendant, W. C. Ratcliffe, as administrator of Cora F. Faust, deceased, by U. M. & G. B. Rose, Clark & Williams & J. M. Moore, Esqs., his solicitors, and files herein his plea of the statute of limitations.

Which plea of the statute of limitations is as follows:

85 In the United States Circuit Court for the Eastern District of Arkansas. In Equity.

THE UNITED STATES, Plaintiff,

v.

CHARLES W. BEEBE *et al.*, Defendants.

Comes the said defendant, William C. Ratcliffe, adm'r of Cora F. Faust, deceased, and for plea herein says that the cause of action of the said heirs and representatives of Nathaniel Philbrook, deceased, has not accrued at any time within seven years next before the commencement of this suit.

Wherefore he prays to be hence dismissed with his reasonable costs and charges.

U. M. & G. B. ROSE,
CLARK & WILLIAMS,
J. M. MOORE, *Sol's.*

I, William C. Ratcliffe, say that the foregoing plea is not interposed for delay, and that it is true in point of fact.

W. C. RATCLIFFE.

Sworn to and subscribed before me this 6th March, 1883.

RALPH L. GOODRICH, *Clerk.*

86 We certify that, in our opinion, the above plea is well-founded in point of law.

March 6, 1883.

U. M. & G. B. ROSE,
J. M. MOORE,
CLARK & WILLIAMS, *Sol's.*

Endorsed: Filed March 6, 1883. Ralph L. Goodrich, clerk.

And on April 2, 1883, the following proceedings were had, to wit:

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Comes the complainant, by Cummings & Baker, Liberty Bartlett & Charles C. Waters, Esqs., solicitors, and files herein its replication to the plea of the statute of limitatioas, motion to set demurrer and pleas down for hearing.

Which replication to plea of the statute of limitations is as follows:

87 *Reply to Plea Statute Limitations, Stale Claims, &c.*

In Circuit Court, Eastern District of Arkansas.

UNITED STATES, Plaintiff, *v.* CHARLES W. BEEBE *et al.*, Defendants.

Complaint in equity.

The said plaintiff, as to the said plea of said defendant, W. C. Ratcliffe, as administrator of the estate of Cora F. Faust, deceased, that this claim is stale and did not accrue at any time within seven years next before the commencemeet of this action, saith—

That the said plaintiff, by reason of anything by the said defendant in said plea alleged, ought not to be barred from having and maintaing its aforesaid action thereof against the defendant and defendants to this action, because, he says, that on the 7th day of June, 1838, and on the 25th day of September, 1839, the United
88 States issued three patents to the lands described in said bill of complaint to Roswell Beebe, which said patents were issued by mistake and under a misapprehension of the law and facts, which said mistake and misapprehension was caused by the false and fraudulent representations and fraud of said Beebe.

That said Beebe was not entitled to the said patents at the time the same were issued and is not now.

That said Beebe, his heirs, and legal representatives, have been requested to return and surrender said patents to the United States that the same might be canceled, but that they have refused to do so.

That this action is instituted by the United States for its sole benefit, and not for the benefit of any person or persons, to cause the said fraudulent patents to be vacated, delivered up to the United States, and canceled.

89 That no lapse of time runs against the United States, and it is not barred from having and maintaining its said action. And this the said plaintiff is ready to verify.

CHAS. C. WATERS,
U. S. Att'y.
CUMMINGS & BAKER,
LIBERTY BARTLETT,
Solicitors for Plaintiff.

I, Liberty Bartlett, say that the foregoing plea is not interposed for delay, and that it is true in point of fact.

LIBERTY BARTLETT.

Sworn to and subscribed before me this 2nd day of April, 1883.
RALPH L. GOODRICH, *Clerk.*

I certify that, in my opinion, the above is well founded in law.
LIBERTY BARTLETT, *Sol.*

Endorsed: Filed April 2, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

90 Which motion to set demurrer for hearing is as follows, to wit:

United States Circuit Court, Eastern District of Arkansas.

UNITED STATES *v.* CHAS. W. BEEBE *et al.*

Comes the said plaintiff and moves the court to set down for a hearing on the next rule day after the filing hereof the plea of Kate Faust filed herein on the 6th day of March, 1883, asking to have the case dismissed because the same is not prosecuted by the Attorney General of the United States and because the cause of action is stale; and plaintiff asks that the replication of plaintiff to the plea of limitations interposed by W. C. Ratcliffe, as administrator of Cora F. Faust, be taken and considered as a replication of so much of said motion asking this case dismissed because it is stale.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Solicitors for Plaintiff.

CHAS. C. WATERS,
U. S. Attorney,

91 Endorsed: Filed April 2, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

Which motion to set pleas for hearing is as follows:

In the U. S. Circuit Court, Eastern District of Arkansas.

UNITED STATES *v.* CHAS. W. BEEBE *et al.*

Comes the said plaintiff and moves the court to set down for hearing on the next rule day succeeding the filing hereof the plea of W.

C. Ratcliffe as administrator of Cora F. Faust, filed March 5, 1883, asking an order dismissing the cause for want of parties defendant herein.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Solicitors for Pl't'ff.

CHAS. C. WATERS, *U. S. Att'y.*

92 Circuit Court, Eastern District of Arkansas.

UNITED STATES *v.* CHAS. W. BEEBE *et al.*

Comes the said plaintiff and moves the court to set down for a hearing at the next rule day succeeding the filing hereof the demurrer of J. W. Martin & wife to the bill *to the bill* of complaint herein, and filed on the 5 day of March, 1883.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Solicitors for Pl't'ff.

CHAS. C. WATERS, *U. S. Att'y.*

Endorsed: Filed April 2, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

And on April 3, 1883, the following proceedings were had, to wit:

93 UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Come the defendants, by U. M. Rose, Esq., their solicitor, and file herein affidavit of A. H. Garland.

Which affidavit is as follows:

STATE OF ARKANSAS, *County of Pulaski:*

I, A. H. Garland, being duly sworn, say that on or about February 26, 1883, I addressed to the Attorney General of the United States a note asking him for copies of his correspondence with the U. S. district attorney at Little Rock on the subject of the suit of the U. S. *v.* Charles W. Beebe *et al.* pending in the U. S. court at Little Rock, and that in reply I received from him the letter hereto annexed, marked Exhibit A.

A. H. GARLAND.

94 Subscribed and sworn to before me this 2nd day of April, 1883.

[SEAL.] WM. A. COMPTON,
Notary Public.

"EXHIBIT A."

DEPARTMENT OF JUSTICE,
WASHINGTON, *Feb'y* 26, 1883.

Hon. A. H. Garland, U. S. Senate.

SIR: I have the honor to acknowledge the receipt of your note of the 26th inst. requesting copy of the correspondence between the

district attorney at Little Rock and myself as Attorney General respecting the commencement of a certain suit to vacate land grants covering land in Little Rock, &c.

It would give me pleasure to comply with your request if I could do so consistently with the rules of this office and with what I deem a proper course to pursue in this particular case.

Upon full consideration, however, I do not think it right
95 or expedient to depart from the usual course of proceedure in such cases or to expose what passes between officers of the Government in respect to a matter of administration. I must, therefore, however, reluctantly decline to furnish the copies you desire.

Very respectfully,

BENJAMIN HARRIS BREWSTER,
Attorney General.

Endorsed: Filed April 3, 1883. Ralph L. Goodrich, clerk.

96 And on April 4, 1883, the following notice was filed, to wit:

In the U. S. Circuit Court for the E. Dist. Ark.

UNITED STATES, Plaintiff,

v.

CHARLES W. BEEBE *et al.*, Defendants.

Mr. Liberty Bartlett and Mr. Charles C. Waters, solicitors for plaintiffs.

SIRS: I- order to prevent any misapprehension on your part as to the manner in which the present suit will be conducted by the defendants, we beg leave to advise you that the strictest application of the rules of the court will be invoked by them for the purpose of speeding the case to an early conclusion, and that a compliance with the rules will be exacted from you.

Very respectfully,

97 J. W. MARTIN & WIFE,
By J. W. MARTIN.
CLARK & WILLIAMS.
J. M. MOORE.
U. M. & G. B. ROSE.

On which notice the following return of the marshal appears:

I have served the within notice by delivering a copy into the hands of the within-named Liberty Bartlett & Charles C. Waters at Little Rock, in the eastern district of Arkansas, on this 1st day of March, 1883.

JOSEPH T. BROWN, JR.,
U. S. Marshal.

Endorsed: Returned & filed April 4, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

And on April 9, 1883, as follows:

98 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas begun and holden on Monday, the ninth day of April, anno Domini one thousand eight hundred and eighty-three, at the United States court-room in the city of Little Rock, Arkansas, the Honorable George W. McCrary, circuit judge, presiding and holding said court, the following proceedings were had, to wit, on April 9, 1883:

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Comes the defendant, W. C. Ratcliffe, as administrator of Cora Faust, by M. W. Benjamin, Esq., his solicitor, and files herein his demurrer to so much of the bill as refers to lands embraced in claim 156; and come the petitioners, by *by* Liberty Bartlett, Esq., their solicitor, and file herein affidavit, letter, and petition to remove the cause to another circuit, and the said motion to remove is heard, argued, and submitted to the court; and the court, being now well and sufficiently advised in the premises, considers that said motion be overruled.

Judge Henry C. Caldwell was not on the bench when these
99 papers were filed and motions made, and took no part in the decision of the same. (See entry made on 27th day of February, 1883, Record Book "D," page 639.)

Which demurrer of Ratcliffe, &c., is as follows:

United States Circuit Court, Eastern District of Arkansas, April Term thereof, 1883.

UNITED STATES *vs.* CHARLES W. BEEBE *et al.*

The defendant, W. C. Ratcliffe, administrator of Cora F. Faust, comes and files for himself as such administrator his special demurrer to so much of the bill as claims any title or right to title, legal or equitable, to the lands embraced in the supposed New Madrid claim of Henry Cockerham, numbered 156, and alleges therefor the following reasons:

100 1st. The plaintiff fails to state facts sufficient to show that Henry Cockerham or any one claiming under him ever acquired any legal or equitable right to a patent from the United States to the whole or any portion of the land claimed to have been located under said Cockerham certificate No. 156.

2nd. The bill fails to state facts sufficient to show that defendant ever had any title to so much of the land as is claimed in the bill by virtue of the Cockerham claim No. 156.

3rd. The bill shows upon its face that the lands covered by the Cockerham claim No. 156 were certified or patented to the State of

Arkansas, which makes the State an indespensable party and at the same time fails to make the State a party to the bill.

4th. This court has no jurisdiction to annull and set aside a certificate or patent of land granted to the State in pursuance of an act of Congress without making the State a party to the bill.

101 5th. The bill shows upon its face that all pretended claims of the Philbrook heirs to the lands embraced in Cockerham claim No. 156 are barred by statute of limitations.

6th. The bill shows upon its face that in regard to the lands embraced in Cockerham claim No. 156 there was gross laches upon the part of Cockerham and those that claim under him.

Wherefore he prays that so much of said bill as relates to lands embraced in the claim of Henry Cockerham, No. 156, be dismissed, and for all proper relief.

I, M. W. Benjamin, counsel for defendant, do hereby certify that I believe the within demurrer is well taken in point of law, and that the same is not taken for delay.

M. W. BENJAMIN, *Solicitor.*

102 I, W. C. Ratcliffe, do solemnly swear that the foregoing demurrer is not taken for the purpose of delay.

W. C. RATCLIFFE.

Subscribed & sworn to before me this 9th April, 1883.

RALPH L. GOODRICH, *U. S. Com.*

103 Which letter is as follows:

Judges' chambers, United States courts, eastern district of Arkansas—Henry C. Caldwell, district judge.

LITTLE ROCK, *Sept.* 27, 1877.

MY DEAR MCCRARY: Some parties are seeking to obtain a patent to the land on which this city is built. Patents were issued for the lands forty years ago, & these parties are now seeking to obtain a second patent for the same lands.

Burdett, while Commissioner of the Gen'l Land Office, without notice to a single owner of the lands under the first patent and in utter disregard of the law & the settled practice of the Department, was on the point of ordering a second patent to issue to these claimants.

The matter is now pending before the Secretary of the In-
104 terior, and I send you Senator Garland's brief in our behalf.

I wish you would read the brief and take interest enough in the matter to see that Gen'l Williamson does not make any such blunder as Burdett. My homestead, & indeed the whole city proper, is covered by the claim. I have written Williamson, and would like to have you see that letter & talk with him — the case. We feel quite certain that a second patent would not affect our titles, but it

would cast a cloud over them that would have a tendency to retard the growth & improvement of the city until it was set aside.

Yours truly, HENRY C. CALDWELL.

Hon. Geo. W. McCrary, Secretary of War, Washington, D. C.

Endorsed: Filed April 9, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

Which petition to remove is as follows:

105 *Petition for Removal.*

In the Circuit Court of the United States for the Eastern District of Arkansas.

THE UNITED STATES OF AMERICA, by Her Attorney General, Benjamin H. Brewster, Complainant,
against
CHARLES W. BEEBE *et al.*, Defendants.

Complaint in equity.

To the honorable judges of the circuit court of the United States of the eastern district of Arkansas:

Your petitioners herein, to wit, Geo. V. Deitrich and Jabez C. Hunt, citizens of Illinois, Galesburg, and John F. Colder, a citizen of Troy, New York, the duly appointed and acting trustees for the heirs and devisees of Nathaniel Philbrook, deceased, and parties beneficiaries herein, as set forth and shown in said plaintiff's bill of complaint, respectfully represents that in conformity with instructions
106 and an order issued out of the Department of Justice, at Washington, D. C., June 7th, 1882, on the petition of said trustees, asking that a suit in equity be instituted in the proper court by and in the name of the United States to set aside patents to lands therein described and set forth wrongfully issued to said defendants, the same directed to C. C. Waters, U. S. attorney at Little Rock, here shown, attached to the bill of complaint herein, directing that on a proper inquiry and finding, presumed to have been made after four months' investigation, and when a bill in equity is presented by the attorneys of said parties, and a satisfactory bond is filed by said petitioners, then to sign the name thereto of Benjamin H. Brewster as Attorney General of the United States, and file the same in the proper court, and, after the suit is commenced, the counsel for the petitioners will have the control and management of the case.

107 Your petitioners further represent that in compliance with said order and instructions, its conditions fully complied with, evidenced by said U. S. attorney, C. C. Waters, signing the name of Benj. H. Brewster, Attorney General, to said bill, and attaching thereto his said letter of instructions and authority, together with a satisfactory bond, approved, and on the 23rd day of November, 1882, filed the said bill of complaint, 25 or 30 exhibits, and approved

bond in this honorable court, on the chancery side thereof, by delivering to the clerk of this court said bill, exhibits, and bond, who received and endorsed the same, filed as of date, and announced to said clerk that the said petitioner's attorney, then present, would have charge and management of the case. Whereupon the attorney for the petitioners, Liberty Bartlett, entered his appearance of record, and, at the suggestion of said U. S. attorney, Judge Waters,
108 he tendered $25.00, which was received, for the estimated fees for clerk's service, and offered $35.00, the marshal's estimated fees for service of process, and to conform to the usual practice in cases of non-resident plaintiffs, he, as attorney, in writing, bound himself to pay the cost- in advance as they should accrue; and, further, in the performance of his duty as attorney and solicitor for said petitioners, at the commencement of the suit, he called up said bill and informed the clerk as to the names, conditions, and residence- of the defendants therein named, and for reason three were to be served in California, the service of subpœnas might be deferred till Monday following, November 27th, but no longer, whereby the said clerk of this court assumed official duties to perform, as of course, which to neglect or refuse to do puts at defiance the authority of the United States, as expressed through the Department of Justice,
109 and works a denial of the just and lawful rights of said trustees acquired through said Department order, and your petitioners are without remedy, except by a rule on said clerk to issue subpœnas, and for reason of interest the judge of this court is disqualified to act therein or in any way to give force and validity to the action or non-performance of the prescribed duties of this court; all of which your petitioners are ready to make appear.

Your petitioners further show that heretofore, to wit, in June, 1879, to be just and equitable the said trustees issued printed circulars to the occupants of the lands in question setting forth their title deeds and showing the grounds which they claimed a right thereto. In reply to said circulars, seven, pronounced adverse claimants, speaking for all, through the "Gazette" of ——, 1879, to be frank and generous, in terms, offered large inducements—land sharks—
110 for said trustees to bring a suit wherein they, too, could show their title deeds and settle the vexed questions for all time to come.

Two years before this, in 1877, when petitioners were moving on the Land Department for patents herein, their learned attorney, Senator Garland, filed a printed argument wherein he mentioned that the said trustees should proceed by suit, in the name of the United States, just as they have done and set forth in said bill of complaint—an argument and showing—examined and considered by the said U. S. attorney, C. C. Waters, before the finding that the bill in equity was the proper proceeding, and signed, filed the same, thus an opening made for said defendants to come in and show their title deeds for judicial adjustment, a kindly offering they should not be deprived of by obstacles interposed as hereinbefore mentioned.

And, further, on being thus repeatedly called the said trust-
111 ees employed the present attorneys of record to institute pro-

ceedings in the proper court of equity so as to let in the said defendants to show any lawful rights they may have and seemed so much to desire.

And to treat properly in November, 1881, the local attorney, Bartlett, informed in writing the first-named defendant at California, Charles W. Beebe, holding one-fourth interest in said lands, that he was employed as attorney therein and in the preparation of a suit in an equity court, together with the several favorable opinions thereto by the heads of Departments at Washington, D. C., and thereby open a way for him to appear and defend his deceased father, if he could, against alleged crookedness in procuring the "Beebe patents," and deemed sufficient, no other writing was had, and the said defendant remains unlawfully ignorant of the commencement of this suit by means of the aforesaid neglect or refusal of the clerk to issue subpœnas, as required by law to
112 do, and the court as now constituted is incompetent to render the relief required.

Wherefore your petitioners pray, as in duty bound, the premises considered, as hereinbefore set forth and alleged, and as in part the authorized conduct and management of the case, and for the further cause shown by a certified copy of an affidavit hereto attached, the sworn statement of — being concerned in interest herein, such as to render improper for the affiant, the Hon. H. C. Caldwell, judge of the said eastern district circuit court, to set on the trial hereof. Thus disqualified, the petitioners pray the court to cause the fact to be entered on the records of this court and also an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the western district United States circuit court of Arkansas, the next nearest, most con-
113 venient and accessible court, to the end that upon the filing of such record with the clerk of the western district circuit court said court can take cognizance of and proceed to hear the case in like manner as if it had originally and rightfully been commenced therein and as provided by law. As in duty bound your petitioners will ever pray.

LIBERTY BARTLETT,
Attorney and Solicitor for Trustees & Petitioners.

Application and Motion for Removal.

In the Circuit Court of the United States for the Eastern Dist. of Arkansas.

THE UNITED STATES, Plaintiff,
against
CHARLES W. BEEBE *et al.*, Defendants.

Complaint in equity.

To the honorable judges of the circuit court of the United States of the eastern district of Arkansas:

114 Comes the said party plaintiff and moves the court here, the premises considered, as set forth and alleged in the fore-

going petition of said trustees for the heirs of Nathaniel Philbrook, deceased, &c., by their said attorneys, appointed to the control and management of the above-entitled cause, the affidavit and letter certified out of the Department of Justice at Washington, D. C., showing the interest and manifest impropriety of both of the judges of said eastern district circuit court, to wit, the Hon. H. C. Caldwell and Hon. Geo. W. McCrary, of their sitting in the trial of said cause.

And in consideration whereof the said parties plaintiff, by their said attorneys, come and move the court to cause the fact to be entered on the records of the court and to make an order that an authenticated copy thereof, with all the proceedings in this case, shall be forthwith certified to the next nearest and most convenient circuit court in this circuit—that is, to the western
115 district United States circuit court of Arkansas, it being the next nearest, most convenient and accessible to the parties hereof, to the end that upon the filing of such record with the clerk of the said western district circuit court said court can take cognizance of and provide to hear the case in like manner as if — had originally and rightfully been commenced therein as provided by law.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Attorneys for Plaintiff.

I, Liberty Bartlett, say that I believe that the foregoing petition and pleas are true in point of fact, and that they are not interposed for delay.

LIBERTY BARTLETT.

Sworn to and subscribed before me this —— day of April, 1883
—— ——, *Clerk.*

116 In our opinion the foregoing plea is well founded in law.
CUMMINGS & BAKER,
LIBERTY BARTLETT,
Solicitors.

Endorsed: Filed April 9, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

And on April 17, 1883, the following proceedings were had, to wit:

UNITED STATES
v. } 520.
CHARLES W. BEEBE *et al.*

Comes the United States, by Charles C. Waters, Esq., and files herein a letter from the Attorney General of the United States.

The district judge did not sit during this proceeding.

Which letter is as follows:

117 DEPARTMENT OF JUSTICE,
WASHINGTON, *April 10th*, 1883.

Charles C. Waters, Esq., United States district attorney, Little Rock, Arkansas.

SIR: Referring to your letter of the 8th ultimo, respecting the case of the United States *vs.* Charles W. Beebe *et al.*, I think my name, as Attorney General, signed to the bill, with the letter of authority to you to so sign it, is entirely sufficient to show that the Attorney General ordered the suit to be brought, and that he has control of and is responsible for the case, as required by the Supreme Court in U. S. *vs.* Throckmorton.

But to remove all doubt I hereby ratify and confirm your action in commencing the suit in signing my name as Attorney General to the bill in equity and filing it in the circuit court of the United States for district of Arkansas.

Very respectfully, BREWSTER,
Attorney General.

118 Endorsed: Filed April 17, '83. Ralph L. Goodrich, clerk.

And on April 19, 1883, the following proceedings were had, to wit:

UNITED STATES
v. } 520.
CHARLES W. BEEBE *et al.*

And now comes the United States, by Charles C. Waters, Esq., district attorney, and by Liberty Bartlett, Esq., and come the defendants, by U. M. Rose, John M. Moore, and Samuel W. Williams, Esqs., their solicitors, and this case is argued and submitted to the court upon the demurrer to the bill and on the motion to dismiss and the plea of —.

And it is ordered that all the exhibits in the bill be filed within two weeks and that the brief for defendants be filed forthwith, and that the brief for complainants be filed on or before May tenth, 1883.

119 And leave is given to defendants to file a brief in reply.

Caldwell, district judge, being interested, did not sit in or take any part herein.

And on May 10, 1883, the following proceedings were had, to wit:

UNITED STATES
v. } 520.
CHAS. W. BEEBE *et al.*

Comes Liberty Bartlett, Esq., and files herein his motion to have time extended in which to file his brief in this cause.

Which motion is as follows:

120 In the United States Circuit Court, Eastern District of Arkansas. In Equity.

THE UNITED STATES OF AMERICA, by her Attorney General, Benj. H. Brewster, Plaintiff,

v.

CHARLES W. BEEBE *et al.*, Defendants.

In obedience to an order of court, comes the said plaintiff, The United States, by her attorneys, Cummings & Baker & Liberty Bartlett, and by leave of court files herein a printed brief, as exhibit of Cummings & Baker complete; also, in an unfinished form, in part, the brief of Liberty Bartlett, the remaining part still in the hands of the printer; the same offered for filing, to comply, as far as may be, to an order of court to file briefs on the part of the plaintiff on the 10th of May, 1883.

And for cause shown move the court for time extended to the 20th of May inst. for plaintiffs to file their briefs, and leave
121 to withdraw the said brief in the printer's hands to put in proper printed form; also for leave to file the Attorney General's brief, if he desires to do so.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Attorneys for Pl'ff.

Cause shown.—Latest advices from attorneys, C. & Baker, state that Attorney General Brewster was confined to his room by illness; that he had received defendants' brief and desired to take some action thereon.

That the time allowed Attorney Bartlett to reply to 150 pages in a brief filed by the defendants and brief his own case, prior official engagements holding to May first, though a strong man, taxed to the extent of human endurance, has been insufficient to complete the work.

BARTLETT, *Sol.*

Endorsed: Filed May 10, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

122 And on May 21, 1883, the following motion was filed, to wit:

In the United States Circuit Court, Eastern District of Arkansas. In Equity.

UNITED STATES, Plaintiff,

v.

CHAS. W. BEEBE *et al.*, Defendants.

Comes the said plaintiff, The United States, by her Attorney General, Benj. Harris Brewster, and moves to dismiss, without prejudice

to any other action which it may desire to bring, so much of the cause of action alleged in its complaint as relates to the land in said complaint, located with the Cockerham certificate No. 156.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Attorneys.

Endorsed: Filed May 21, 1883. Ralph L. Goodrich, clerk.

123 And on the 18th day of June, 1883, was filed the following motion to strike defendants' brief from the files:

Motion to Strike Brief from the Files.

In the United States Circuit Court, Eastern District of Arkansas. In Equity.

UNITED STATES, Plaintiff,
v.
CHARLES W. BEEBE *et al.*, Defendants.

Comes the plaintiff, The United States, by attorneys, Cummings & Baker and Liberty Bartlett, and moves the court for an order striking from the files of the court the printed brief and argument of defendants' attorneys, subscribed and submitted by U. M. & G. B. Rose, J. M. Moore, Clark & Williams, and filed herein, and for cause say:

I. That said brief and argument is impertinent, libelous,
124 scandalous in tone, insulting to the plaintiff and attorneys, and trans-ends all decency and sense.

II. That it is in contempt, insulting, and grossly abusive to this honorable court to the person and official station of Attorney General, the Hon. Benj. H. Brewster, while in the performance of his official duty.

III. That it is deceptive and insulting to the plaintiff, their attorneys, and the court in changing the title to said action in derision by adding parties plaintiff in temper and spirit of disobedience to law and court rule.

Wherefore it is moved that said brief be stricken from the files in terms of rebuke that will maintain the honor and integrity of the court and official station.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Attorneys, &c.

Endorsed: Filed June 18, 1883. Ralph L. Goodrich, clerk.

125 And on June 30, 1883, the following proceedings were had, to wit:

THE UNITED STATES, by her Attorney General, Benjamin H. Brewster,
v.
CHARLES W. BEEBE, THOMAS FRASER, JULIA FRASER, JOSEPH W. Martin, Emma Martin, Hartwell Beebe, Kate Faust, Emma Faust, John Faust, Fannie Faust, Roswell Faust, and Henry Faust; Wm. C. Ratcliffe, Adm'r of Cora F. Faust & Guardian of Kate, Emma, John, Fannie, Roswell, and Henry Faust. } 520.

Comes the complainant, by Liberty Bartlett and Charles C. Waters, Esqs., its solicitors, and come the defendants, by U. M. Rose, Sam. W. Williams, and J. M. Moore, Esqs., their solicitors; and now the court, being well and sufficiently advised of the matters arising on the demurrer to the bill of complaint herein, considers that the same be sustained.

126 It is further ordered that upon entering the order sustaining the demurrer to complainant's bill leave be granted to complainant to amend the bill on or before the first day of the next term.

NOTE.—Judge Caldwell did not sit in this case.

And on October 13, 1883, the following proceedings were had, to wit:

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Comes the United States, by Cummings and Baker and Liberty Bartlett, Esqs., her solicitors, and by leave of court files herein her amended bill.

The district judge did not sit during this proceeding.

Which amended bill is as follows:

127 *Amendment to Bill.*

In the United States Circuit Court, Eastern District of Arkansas.

THE UNITED STATES OF AMERICA, by her Attorney General, Benjamin H. Brewster, Plaintiff,
v.
CHARLES W. BEEBE *et al.*, Defendants.

Bill in equity.

Comes the said plaintiff, by her Attorney General, and by leave of court amends her bill heretofore filed by interlineation and insertion of the following amendment next after the charging paragraph of collusion and fraud in procuring the Beebe patents, on page 12, after the words Exhibit I, I^1, I^2, I^3, I^4, I^5 of the said bill, as follows: And your orator further alleges and shows that there are special

reasons for the amendment, to apply to, and extend said charging paragraph as hereinafter mentioned, showing the facts and
128 circumstances of the Ashley-Beebe combination therein mentioned; that there was a designed fraudulent concealment of the methods in procuring the said Beebe patents, of which your orator was ignorant at the time of stating the fraudulent practices, but were afterwards discovered and hereinafter stated; and, further, it has appeared that the attorneys employed to prepare the bill of complaint acted from fear and apprehension, intimidated by the threatening attitude, power, and influence of the defendants, and from the nature of the case were overawed and deter-ed from inquiry to find or allege the fraudulent transactions as afterwards appeared and hereinafter stated.

And your orator further states that the said trustees for and heirs of Nathaniel Philbrook, deceased, claimants to the lands in question, mentioned and refer-ed to in said original bill, were simply petitioners for the United States, &c., to institute proceedings
129 herein, in her own name and behalf, and not as parties plaintiff, for reason of frequent public demonstrations of a powerful combination designed to destroy or conceal all evidence of the Philbrook title, to create a local prejudice, ill-will, and personal violence against the said Philbrook heirs on their first appearance in 1841, so held in constant fear up to and after the war between the sections as to close the courts against the appearance of said Philbrook heirs to institute suits in their own name and behalf; and open threats of violence prevented the said heirs or their agents and attorneys from a free access to the public records to find the evidence to prosecute and enforce their lawful rights, as will be hereinafter shown.

And, further, it appears from Exhibit "I I" aforesaid that Nathaniel Philbrook was murdered and died in 1824 possessed of said three New Madrid locations (the fourth, the Cockerham claim,
130 having been discontinued herein); that one W. E. Woodruff, who is still living and a competent witness herein, wrote to the father of said Nathaniel, residing in New Hampshire, that his said son was murdered, leaving a large estate in property, money, and lands, and himself, said Woodruff, as next friend, was in the care of and administering the estate, and advised letting the lands lie, as they were largely increasing in value, for reason the capital city of Little Rock was being built thereon. By operation of law the father inherited the estate and instructed said W. E. Woodruff to sell the personal property, pay all just debts, and remit the residue; to hold and care for the lands till further instructed.

In four years thereafter, in 1828, the father, Elipelet Philbrook, died, leaving the said estate by will to his minor grandchildren, residing in New Hampshire, 1,500 miles away, and letters or advises from said Woodruff, administrator, had ceased. So the said
131 heirs were kept in ignorance of their rights or interests for eighteen years, till 1841–'42, when the principal heir, Thomas H. Ellison, appeared at Little Rock to assert the rights of the Philbrook heirs to the aforesaid New Madrid locations. This was about

two years after the issue of the Ashley-Beebe patents, put in issue here for fraud in the procuring, and of which said T. H. Ellison was kept in ignorance.

Having informed himself by the aforesaid letters of W. E. Woodruff, said Ellison, on arriving at Little Rock in 1841, called said Woodruff, administrator, to account for the personal estate, the rents and profits of the lands at first reported.

The said administrator evaded and refused to give said Ellison any information further than saying that Philbrook left no estate, and that other parties had taken up and held possession of
132 the said lands. He took Ellison to the recorder's office and pretended to look over the records, then turning to Ellison said, No; Philbrook left no real estate, when there was at that time of death and continuously shown on the records to the present eight or ten deeds of title in said New Madrid locations, some jointly held with Chester Ashley, and conveyances of lots and blocks held good to this day, title derived from said Philbrook; and it was in the face and knowledge of these records of ownership and legal title to said New Madrid locations that all subsequent conveyances were made, and that the Beebe patents were procured as hereinafter stated. In four years said Philbrook established a character for wealth, judicious investment, honor, integrity, capacity to lay out and build a city that took fourteen years for the administrator, Ashley & Beebe to secreet- and overcome sufficiently to seize upon
133 his lands and convert — to their own use.

Said Nethaniel Philbrook, receiving an appointment from President Monroe, came to Arkansas in 1820, with the first Territorial Governor, James Miller, both from New Hampshire, a single man, having large means, designed to invest in lands; and beside the city locations he purchased farming lands in the country, which stand in his name to this day. At the time of his death said W. E. Woodruff was editor of the Arkansas Gazette, and that paper of April 20, 1824, after stating the circumstances of his death, the finding of his body shot through the heart, &c., say- this: "Mr. Philbrook was a native of New Hampshire, where his relatives reside, and he was a few years since extensively engaged in the mercantile business in the city of New York. He emigrated to this country about four years ago; was distinguished for his intelligence
134 and gentlemanly deportment, and all who knew him deplore in him the loss of a sincere friend, an upright and honest man, and a good citizen."

It is held to be the highest duty of man, where put in the way of it, whatever may be his station in life, to protect and defend the property and memory of a man thus appreciated and registered by strangers in a strange land as an inheritance to rightful heirs.

And from the aforesaid letters and publications of said W. E. Woodruff he undertook the administration and care of the estate to preserve and faithfully deliver to the Philbrook heirs; that he was at first acting in good faith will appear from the several public notices of his administration of said estate. And under date of October 12, 1824, he advertises his personal property for sale, naming

several articles such as a gentleman of wealth and standing would have in those days.

135 The Gazette report further states that said Philbrook was the Government agent to the Osage Indian Nation, and the record shows that as he was about leaving on a hazard- mission to hostile tribes as a precaution he executed a power of attorney to his confidential friend and attorney, Chester Ashley, to convey certain lots and blocks, the same of record and here shown—Exhibit "C"—and which he afterwards fraudulently used as a general power of attorney. The fact that three or four lots were mentioned goes to prove that no others were intended.

With such a record, made by a man distinguished for his intelligence, virtue, skill, and means to lay out and construct the prospective capital city, — seemed to require fourteen years to overcome and divert the said lands from the rightful locator by methods of recent discovery, as well — the inducements to conceal the records aforesaid.

136 When, in 1838–'39, said Ashley, Beebe, and others combined and operated a scheme to capture the Philbrook New Madrid locations, they were conditioned as follows: As appears of record, the lands were owned and held by Ashley and Philbrook jointly, so conditioned as that Ashley was bound to exercise the same care of the Philbrook interest as his own. His title deeds remained on record, of the same force and effect as at the day of his death, and the said administrator was bound to hold, preserve for natural increase, and collect rents and profits for the heirs of said Philbrook.

The New Madrid locations were borne upon the records in the Land Department at Washington, D. C., the most serious obstacle to overcome in procuring the Beebe patents, holding that the representatives of Nathaniel Philbrook would be entitled to patents on call. The Government certificates and obligations were out for

137 patents, the Philbrook heirs, scattered over the hills of New Hampshire without due notice, remaining ignorant of their rights or the several moves being made to capture their inheritance.

And here appeared a dark and inexplicable condition of affairs. Ashley and Philbrook held the New Madrid locations jointly, and Ashley could at any time have taken out patents for his half, and for existing friendship and business relations as attorney he could have worked up and secured the rights and interest of the Philbrook heirs at the same time. These facts, known to the Land Departments at Washington, cast suspicion upon the moves of Ashley and Beebe to procure patents on spreading Cherokee floats over the capital city two years before, 1836, — mad- a State, in violation of the President's printed circular forbidding such locations. Ashley was a U. S. Senator at the time, holding an overpowering in-

138 fluence, and the aforesaid exhibits, reports of the land commissioners, &c., show the several methods proposed all unsatisfactory till they hit upon the way for Roswell Beebe to execute a good bond giving assurance to the United States to the effect that

he would satisfy all parties holding title derived from said New Madrid locations by executing a quitclaim deed to all parties showing such title.

The said bond here shown, Exhibit "I," whereupon said patents were issued, and in pursaance thereof said Roswell Beebe executed a quitclaim deed to Chester Ashley for half of said lands held jointly by Ashley and Philbrook under the New Madrid locations, and said Beebe holding the Philbrook half, the said administrator assenting thereto, and so held to the present time, in the face of said Philbrook title deeds borne upon the public records showing clearly by the surroundings, the exhibits aforesaid and hereinafter
139 refer-ed to, the consummation of a scheme and contrivance regardless of the rights of Philbrook heirs, except to usurp, destroy, and conceal, to deceive, to overreach, and overcome the Government officials of the Land Department and permit a simple promise in the form of a bond to stand in place of the public records, in lieu of the wise and considerate acts of Congress and the solemn adjudications thereon to stultify and put at naught its own prior obligations under the New Madrid locations and issue patents as aforesaid on a worthless —, for a voidable promise to satisfy the Philbrook heirs with a quitclaim deed "if called for within a reasonable time," proceedings so manifestly collusive and fraudulent as to be disapproved and condemned by all successors in office, and for years thereafter, up to and after the war, there was such constant litigation between individuals, growing out of such unlawful issue of
140 patents and an adverse public sentiment, costing a four years' war to put down and establish free and open courts, that the United States could not during all these years prosecute a suit in an impartial court, as hereinafter shown.

And further, the time for quitclaim deeds, "if called for in a reasonable time," has a peculiar significance, contrived expressly for the Philbrook heirs. It had no bearing upon any other. A quitclaim had already been made to Ashley as part of the scheme, and except for fraudulent design and capture, he would at the same time have taken a quitclaim for the Philbrook heirs, the very object had in view by the Land Department in issuing the patents; but there would be no money or gain in that. The prize was valued at a million dollars, and they laid a scheme to win, as will appear from the
141 records here shown; that said Beebe would give a quitclaim deed to the State for State-house square, then to defend the same against the Philbrook heirs they would effect such legislation as would limit "reasonable time" as would leave said heirs or the U. S. Government no ground to stand upon.

Said Beebe made a quitclaim deed for the State-house square so framed as that it would not bind Beebe heirs, and left out the land between the State-house and the the river. The trick and the fraud in procuring Beebe patents were discovered and openly denounced by the Legislature of Nov. and Dec., 1840, about one month before the aforesaid first appearance of said principal heir, T. H. Ellison, a most remarkable coming together of the elements of a gigantic fraud and collusion, and an opportunity for compromise with honor

and good will in lieu of concealment and oppression by de-
142 ception and violence—an open confession of the validity of Philbrook title deeds duly recorded in sight, as shown by exhibits hereto attached.

That the said defendants, the ancestry and succession, were constantly reminded every day and every hour of the first appropriation of these land located under New Madrid certificates, and the records in sight was notice to the whole world that the title was in the heirs of Nathaniel Philbrook, who must have their day in court, and that it was by acts of the defendants that they were being prevented from appearing "within a reasonable time."

The Governor, J. S. Conway, in his message—1840—called the attention of the Legislature to the quitclaim deed offered by Beebe and wife for the State-house square, and also to the fact of the long prior New Madrid locations unsatisfied, which must have had
143 reference to the Philbrook interest, for Ashley had already satisfied himself with Beebe's quitclaim deed. The Governor submitted the question whether the State could afford to accept of a deed conditioned with such surroundings. The legislative proceedings and discussions was based on the fact that there were three locations prior to the Beebe locations, under what were called Cherokee floats, either of which was better than that of Ashley-Beebe, and the Philbrook-Ashley New Madrid locations were held to be superior to all others.

The Senate and House, in Dec., 1840, passed a joint resolution adopting the suggestions of the Governor and appointing an agent to proceed to Washington and show the fraudulent issue of the Beebe patents, holding that Beebe and wife quitclaim deed
144 had no validity whatever designed to let Beebe heirs into ownership after his death; that one Wm. Russell, who appears on record as operating with said Philbrook during his lifetime dividing and compromising said lands, settling conflicting claims shown hereinafter, presented a long printed memorial, over twenty pages, to the Legislature showing the deception and fraud used by Ashley-Beebe, first, in procuring the three sham "floats" under which they located the city of Little Rock and obtained patents—the same lands located by said Philbrook in 1821—the consideration $3,000 for the bare lands; and in eighteen years thereafter, in 1839, Ashley-Beebe cover the same with three floats, costing $400, when grown up to five hundred or more houses, valued by said Russell at $900,000. Said Wm. Russell also sets out and alleges grounds for fear of said Ashley's great influence and sharp
145 practice he would secure such enactments as would give undue advantage under said Beebe fraudulent patents, showing in the strongest terms and facts their fraudulent character, the same discussed, considered, and adopted by the Legislature, as shown by exhibits hereto attached.

The said memorial of William Russell was refer-ed to the House judiciary committee, of which a leading attorney of Little Rock, Mr. Cummins, was chairman, who made an elaborate report, here shown. It is mentioned in said memorial that in 1820 O'Hara and

others, meaning Ashley & Philbrook, located New Madrid certificates upon lands claimed by pre-emption of Wm. Lewis, and resisted with great energy, showing its existence a living issue. Said Philbrook had departed this life as aforesaid leaving minor heirs 1,500 miles away, near Canada line, ignorant of their rights; and in after years his confidential friend, said Ashley, operating a scheme
146 to merge the New Madrid certificates in the Ashley-Beebe patents, which to effect there appeared a necessity that the name and title deeds should not be mentioned—easily effected in a changing population of twenty years—and by all means the heirs must be kept in ignorance; hence the administrator ceased writing. During all these years of fierce strife for lands deemed so valuable the validity of New Madrid locations were for a time held to be questionable, when there was a rush with other locations, hereinafter mentioned, followed by twenty-five years' litigation between the several locators in the face of Philbrook title deeds on record, without notice, though timely warned by the courts, as shown presently.

The New Madrid certificates thus for a time under a cloud, so refer-ed to in the aforesaid message of the Governor, and Philbrook buried out of sight, will go to show why the report of the
147 judiciary committee goes exclusively at the outrageous frauds in procuring the Ashley-Beebe patents, under worse than sham floats, imposed upon the Government in violation of law and public justice, set forth in such vigorous terms by said Russell being familiar with every move or step taken by the locators.

The said committee endorse the Russell memorial and say that it is therein sufficiently proved that the floats, so called, procured by Ashley-Beebe, and their use, was by deception and fraud; that under the law they could only be laid on vacant, unimproved lands; yet, they say, the Beebe floats are laid over the city of Little Rock, which has been settled upon and occupied for twenty years and was then inhabited by, perhaps, one thousand families; that the law protects these occupants against floats; yet floats are located
148 over the heads of these settlers in the very face and against the express language of law giving existence to these floats. After further discussing Beebe floats and patents, and the way the Government was deceived and imposed upon, they say, "Patents thus obtained have no binding validity, and the numerous evidences of the darkest frauds — appear at every step in perfecting this title, renders it unwise in the representatives of the State to place the least reliance upon it;" and they refuse to take the offered quitclaim of Beebe and wife for State-House square, but, as a better title, relied on a conveyance derived from Ashley-Philbrook New Madrid locations, the same appearing on the public records here shown.

The said committee further report that "as a result of their extended examination they feel clear in the opinion that said title derived from the Government through the conveyance of Col.
149 Russell is distinctly paramount to, and in every respect better and more to be relied upon, than that of Beebe;" and, as shown by the following deeds of record, that the title mentioned

derived from Col. Russell was in fact derived from Philbrook and Ashley New Madrid locations in Russell's name, the result of a compromise, to wit:

On the 29th day of October, 1821, De Baun, Philbrook, Henry Elliott, and E. A. Elliott gave power of attorney to Chester Ashley to settle and adjust with Wm. Russell and six others who had attempted to lay a pre-emption claim on fractional section 2 and the northeast quarter of section 3, covering part of the New Madrid locations. Ashley did settle, under said power of attorney, with said Russell and others, conveying the disputed lands to them, and the same day Russell and others reconveyed back to Ashley a large number of lots and floats of the same land in compromise, and Ashley reconveyed to Philbrook. The 18th day of
150 March, 1822, De Baun made deeds to Nethaniel Philbrook for the undivided half interest in certificates and locations Nos. 8, 15, and 264, also for N-. 156, the consideration being $1,000 in each deed, which were duly recorded in the recorder's office of Pulaski county, and copies heretofore filed herein, the same appearing of record on the death of said Philbrook, and so appearing during said legislative proceeding, and refer-ed to as the superior and valid title for the State to reply upon, and the same title deeds were of record at the time aforesaid when the said administrator pretended to examine, and turned to the youthful, inexperienced, principal heir, T. H. Ellison, and assured him that Philbrook left no lands at all. It is extraordinary and unaccountable how an administrator of said estate, a man of sufficient intelligence to edit the learned and popular "Gazette," a near neighbor in
151 daily social and business intercourse with said N. Philbrook, Ashley, Beebe, and T. H. Newton, the recorder of land titles, especially the following, clerk of the probate court, to whom he says, in a recent letter, here shown, he passed over the proceeds of his administration, thus endowed and conditioned, could, on being inquired of by the principal heir, T. H. Ellison, as aforesaid, pretended to turn over the record books, then turn and say to him, "No, Philbrook left no real estate," when in fact the following deeds were borne upon the said record just now copied therefrom, to wit:

Ex. C.—O'Hara, deed to Jas. De Baun, chain of title.
" C^1.—Jas. De Baun, deed to Nathaniel Philbrook.
" C^2.—Same, " " Same.
" C^5.—Ashley & wife, " " Same.
" C^3.—N. Philbrook, power of att'y to Ashley to sign bond.
" C^4.—Russell, Philbrook, *et al.*, power of att'y to Ashley to compromise.
Ex. C^6.—Same bill of assurances to city of Little Rock.
" C^7.—Philbrook, Elliott, *et al.*, power of att'y to Ashley to compromise.
152 Ex. C^8.—Ratification of the compromise.
" C^9.—Philbrook *et al.*, deed to Conway.

Besides the foregoing there — on record many other deeds bearing Philbrook's name for lots and blocks and outside conveyances of

land to him, a tract on the opposite side of the river, another for 160 acres ten (10) miles up the river, showing that for four years in connection with his Government agency he was active, vigilant, and worthy of all the honorable mention made by said Woodruff in his "Gazette."

It is evident that his land transactions were all for cash, six or eight thousand dollars the consideration, having all his relatives have claimed for him as a man of means, and ought to serve as a denial of the assertion that the Philbrook heirs are seeking to rob and plunder the heirs of an ancestry here shown.

It is not in accord with the common events of life that an
153 administrator, taken as next friend, should operate in sight of all these title deeds and know not, touch not, handle not, deemed of immense value during all the years mentioned, while former friends were striving to cover the same with pre-emptions, Cherokee floats, and fraudulent schemes innumerable, keeping the Philbrook heirs ignorant of their interest and rights.

In 1872 a relative of Philbrook, residing in Boston, Mass., instituted an inquiry, by letters to W. E. Woodruff, as to what he did with the Philbrook estate, to which he replied in three letters, copies of which *has* been received since the preparation of this bill. In the first two letters he denies any knowledge of Philbrook lands, when in the third letter, dated December 20, 1874, he admits that "at the time of his death he claimed a small interest in the city of Little Rock, which I believe did not prove valid." Just the
154 interest, half of the New Madrid locations, the Government held all along were valid, and required Beebe to convey by a quitclaim deed to Philbrook heirs, and for which she institutes this suit.

The said letters appear like a bright light in a dark place, shedding light upon the pathway of said principal heir, Ellison, on his visit to Little Rock in 1841, saying he called on him, and said Woodruff gave him all the information he had, and said heir was not satisfied, and he applied to his personal enemies. It will appear that his taking off was to conceal the records.

Now, in 1872 he settled the estate and paid over to the probate court, and he had been informed that the records were all lost during the war, and he evidently so believed when he declared that Philbrook left no real estate, having no idea that the books of record containing the aforesaid Philbrook title deeds were preserved
155 and here shown. It is true the probate records were lost during the war, but they were accessible when said Ellison called on him for information, and if he had shown that record to him there would be no inducement to put him out of the way and report him dead, as herein mentioned.

And, further, the said Arkansas Legislature came to an end Dec. 25, 1840, and the following month the said principal heir, T. H. Ellison, appeared to assert their rights to the Philbrook estate, and, as aforesaid, first called the administrator, who refused to make a report, account, or give any information. Finding he was interested and acting against the estate, and Ellison inquired elsewhere. W.

E. Woodruff states in said recent letter that he inquired of his personal enemies, and on consulting with the leading law firm of the city—Cummins & Fowler—(Cummins, of the aforesaid judiciary report) who gave assurance that they were well advised in the
156 premises, and by a proper legal proceeding the said lands would be restored to the Philbrook heirs, and an agreement was entered into to the effect that said Ellison should go back to New Hampshire, get authority to act for all the heirs, and return the next winter, when said attorneys would institute proceedings in the courts to recover said lands. The said T. H. Ellison, thus qualified, did return the following winter—1841–'42—as set forth and alleged in his affidavit, his dying declarations, made necessary by resistless acts of defendants, here shown, marked Exhibit "N," and asked to be made a part hereof. Directly thereafter said Ellison received several anonymous letters, saying that it was known that he was after working up the Philbrook land claim, and if he did not get out of the State within ten days he would be shot to death, &c. Mr. Ellison did not believe they would shoot him, and disre-
157 garded the warning, and he was enticed away by a pretended friend and shot from an ambush—hit in the groin, and laid up for eight weeks, hovering between life and death, when carried to a steamboat bound for the North—made helpless for years and a cripple for life. This put an end to negotiations with said Cummins, who soon after departed this life, and the people of Little Rock were put at rest on a report and firmly believed that said Ellison died on his way home, so they would hear no more from said heirs.

Here appears the befitting culmination of the aforesaid scheme to capture the New Madrid locations and defraud the Philbrook heirs of their inheritance; that this attempted assassination of the principal heir, the continued report and belief of murders and expulsion of peaceable Northern people, the hostile increased growth of a public sentiment, culminating in a civil war in 1861 to '65, which
158 served its intended purpose to prevent the said Philbrook heirs from appearing "within a reasonable time" at the hazard of their lives to prosecute their claim, conditions of hostility and outrage increasing in violence, till a fierce war commenced, all of which is of common knowledge.

And, further, it is shown by said Exhibits "I I," &c., letters and reports of the Land Department and subordinates that while Ashley-Beebe were applying for patents the Government held that the New Madrid locations were valid as recorded in 1822; but there appearing no claimant, the Philbrook heirs, remaining ignorant of their rights, the cause hereinbefore mentioned. To provide for the holders of the said certificates the Government required the said Beebe bond, giving assurance that he would quitclaim to all holding title derived from said locations with special reference to the Philbrook interest. To this said Ashley & Beebe readily assented, hav-
159 ing in view a method to avoid any application by Philbrook heirs at whatever cost in violence; in fact, the very things they did do.

Now, it appears, as will be shown, that during all these twenty-five years, 1841 to 1866, wherein the Philbrook heirs were by force prevented from appearing to prosecute their claims, said Roswell Beebe was constantly reminded of the said valid outstanding Philbrook New Madrid locations and would come up some time for adjustment, and they well knew the residence of the Philbrook heirs to serve legal process, so that during his lifetime and that of his administrator, Geo. C. Watkins, they would give no deed of conveyance to lands in question that would bind his heirs (hence they, the heirs, acquired no rights or equitable interest) like that before mentioned, discussed by the Arkansas Legislature and here shown by a printed list and appraised value of each and every lot, block,
160 and parcel of land held by Beebe estate in 1858, with conditions of sale here shown that in no case would he warrant and defend title.

During the aforesaid twenty-five years threatening, resistless attitude of the defendants against the said Philbrook heirs there were four or more hotly-contested suits continuous from the issue of Beebe patents up to 1866 by subsequent locators, Ashley, Beebe, and others, for the said lands covered by the New Madrid locations.

While pending the Government could only await their termination, as she did in the Hot Springs cases, and like that, trusting she could intervene by suit only by act of Congress or by petition of parties holding a prior equitable title, hence not responsible for delay, Ashley, Beebe, or others could make nothing in these suits without making the Philbrook heirs parties thereto.

There were the aforesaid Philbrook title deeds on record,
161 the administrator, Woodruff, and Philbrook heirs staring them in the face, and the plot to keep the heirs ignorant of their rights. Wherein lay the cause corrupt for the delay—here shown by Exhibit "—" a poor cripple sent to his grave while this suit was awaiting filing in a court corrupted by acts of defendants.

And, further, the said defendants were constantly reminded by the courts trying the said cases that there was something outside concealed by the pleadings that prevented exact justice meted out to all parties, having reference to the New Madrid locations; and Mr. Justice McLean, in 1852, had the courage to say just what the court found and stated in the case of Cunningham *v.* Ashley & Beebe, involving the validity of the Beebe patents on a pre-emption right laid subsequent to the New Madrid locations, wherefore both parties avoid calling Philbrook's heirs.

It appeared on the trial that Cunningham made frequent
162 applications at the Land Office for a patent. On this the court say: "There can be no doubt the claim was rejected as often as it was brought to the notice of the Land Department. So long as the New Madrid locations were sustained no other decision could be made." And say, further, that on the sixth of June, 1838, floats were permitted to be located on lands covered by the New Madrid locations; and of the sham agreement, the Beebe bond, and promise of quitclaim deeds they say: "It is unaccountable that the land officers should have considered the agreement as a compliance with

the regulations which prohibited the entry of floats upon improved or occupied lands.

Here thirty years had elapsed since the public records showed the New Madrid locations were in Nehamel Philbrook, and the "Gazette" had published his high character and assassination
163 while operating a scheme to conceal the fact that there was a live Pilbrook so pleading in said suit as to avoid mention or reference to such record or existing conditions. Yet the fact of the prior location on New Madrid certificates came to the knowledge of the supreme court incidentally and gave notice, good to this day, to all claimants of the Ashley-Beebe stripe in sight of said records that time would overcome all forceable obstructions and give the Philbrook heirs a day in court, in terms as follows: "We have not considered any right equitable or legal under the New Madrid locations laid upon the lands in dispute. Such right, if any existed, is not presented in the pleadings in such a form as to require its consideration and decision. It remains, therefore, wholly ineffectual by this decision." Then, again, in the closing paragraph, as a direct warning to Ashley-Beebe heirs and assigns so appearing
164 in all subsequent deeds of conveyance by said Beebe, charging: "And the court order that the decree shall in no respect affect any right which may or does exist under the New Madrid locations in the defendants or other persons, if any be."

Here appears notice to the whole world, stamped with the authority of law, charging Ashley-Beebe, as defendants, with the New Madrid locations, acting from a knowledge of the recorded title in Nithaniel Philbrook, deceased; the interest and residence of his heirs, the presence and hearing of the administrator, the deadly assault and warning that put the life of the heirs in jeopardy sufficiently accounting for delay the parties chargeable therefor; their refusal for twenty-five years to make them parties to suits and let them in under the protection of the courts. Ashley and Beebe were so charged and conditioned in 1852, while living, the former
165 till 1856 and the latter in 1858, leaving a suit pending involving the lands covered by the New Madrid locations, Rector *vs.* Ashley and Beebe, carried over the war decided in 1866, wherein the Beebe heirs took knowledge of the before-mentioned facts and conditions and continued to interpose obstacle in the way of said Philbrook heirs ever gaining a footing in any court, as hereinafter mentioned.

Your orator further alleges, states, and shows that the heirs of Nethaniel Philbrook, conditioned as aforesaid and believing that the late war had produced a more friendly, just, and equitable conditions with their former adversaries, the said defendants, moved on the said principal heir, T. H. Ellison, in 1870, to visit Little Rock and possibly find a way open to prosecute their claim in the courts, supposed to be reconstructed, open, and free alike to all. Said Ellison appeared at Little Rock and, in view of former treatment,
166 confided his business to three or four persons only, consulting a prominent attorney, and was advised, and verily believed, that if he attempted to move in the prosecution of their claim that

the original threat to take his life would be carried out; and it will be shown that afterwards, for more than ten years, the said Philbrook heirs made every conceivable effort with money and means—by said Ellison, private visits, consultations, and correspondence with friendly-inclined agents and attorneys—to overcome threatened violence and work a peaceable entrance to the courts in their own name or that of trustees. Some of the open, persuasive, peaceable means met with abuse, open threats, and outrage, hereinafter mentioned.

After the said Philbrook heirs, by T. H. Ellison, moved on Little Rock in 1870 and — satisfied that they would be resisted to the death and instructed to believe by the highest legal authori-
167 ties that for reason of threats, violence, and open warfare that laches could not be imputed to them for delay, they moved with all their force, energies, and immense outlay in money and labor on the Government Departments at Washington, D. C., by petition for patents to issue on the certificate evidence of the New Madrid locations held by Nethaniel Philbrook in 1821–'22; that the Government acted promptly thereon. See Exhibit "P," asked to be made a part hereof, the certified "copy of a letter, dated October 1, 1874, addressed to A. C. Mason, Esq., Galesburg, Ill., relative to the course to be pursued in order to procure the issue of patents for the New Madrid locations, 8, 15, 156, and 164, in Arkansas, signed by S. S. Burdett, commissioner," which was to procure a certificate from the land office at St. Louis, Mo. This was the first opportunity the Government had to move in the matter, for the said lands
168 were in continuous controversy in the courts between individuals from the first issue of Beebe patents up to 1866, and the Government could intervene only on petition, and the Philbrook heirs were in duress, ignorant and restrained from the exercise of their rights, as hereinbefore mentioned.

Here the Philbrook heirs were subjected to a very great expense in the employment of agents and attorneys for travelling in several of the States to find forty or more of the heirs and procure their trust deeds to qualify a board of trustees and to inform them for the first — of their interest and rights, for examining the records and procuring copies, stated by Senator Garland to be in two immense piles, journeying and attendance in Washington and at Little Rock, all this beginning directly after the war, in a continuous effort to prosecute their claim, and before the war the expense and years of suf-
169 fering while recovering from a gunshot wound, like the aforesaid case of Cunningham, save in violence, whereof Justice McLane says he carried on for twenty years with commendable energy and no small expense in time and money, and in like manner rejected so long as the New Madrid locations stood in the way.

Upon the aforesaid finding of a course to be pursued to obtain patents due on the New Madrid locations led to the further inquiry and finding as to the validity of the Ashley-Beebe patents; and an extended examination led the Land Office to believe and report that the said Beebe patents had been illegally, unjustly, and fraudulently obtained by deception and false statements; that the lands could

not legally be located upon by Cherokee floats in any case or by agreement of parties, and expressed the opinion that a fraud and injustice had been perpetrated and should be remedied. See
170 Exhibit "I I," &c. And the Government felt bound to do all in its power to correct the wrong that had been effected by its officials.

The Beebe heirs, said defendants, appeared by their attorney, Senator Garland, before the Departments at Washington, D. C., and contested the Philbrook claim at every step, and effecting mostly a delay of five or six years, and chargeable to the time and delay in filing the bill. In 1877 Senator Garland filed an elaborate brief and argument before the Secretary of the Interior, which was to the effect that the validity of Beebe patents was a judicial question whereof the Secretary of the Interior had no jurisdiction, but contended and urged that the proper mode of procedure was by a bill in equity filed in the proper court to test the validity of the Beebe patents; and at the same time within a month the Supreme Court (in Moore *vs.* Robbins, 96 U. S., 530) said "the appro-
171 priate remedy is by bill in chancery brought by the United States." Whereupon the said trustees for Philbrook heirs withdrew their said petition and accompanying papers by consent, and moved on the Attorney General by petition to institute a suit in the name of the United States to set aside the said Beebe patent. The Attorney General, as is customary in all such cases, refer-ed the matter to the Secretary of the Interior for a report as to the facts alleged, and for his recommendations thereon; when, afterwards, March 11, 1880, the Commissioner of the Land Office after a full investigation of the whole matter, extending over six years in controversy, including Senator Garland's brief, reported back the case to the Secretary of the Interior recommending that "a bill in chancery should be brought by the United States in a court of competent jurisdiction to obtain the cancelation or avoidance of the aforesaid (Beebe) patents."

172 Upon which the Secretary of the Interior endorsed over to the Attorney General, July 26, 1880, saying: "I respectfully recommend that proper suits be instituted for the purposes set forth by the Commissioner." Afterwards came the calamitous accident to President Garfield and consequent official changes, which delayed further action for a year or more till the present Attorney General, Hon. Benj. H. Brewster, succeeded to the Department of Justice and took up the case as unfinished business; and finding that the petition and facts therein recited were fully sustained by the Government records, and believing that the case of the claimants was founded in law and justice, he brought the suits treated and abused as hereinafter mentioned, so like working up to the design of the times inserted in the aforesaid Beebe bond to give a quitclaim deed, "if called for within a reasonable time."

173 While operating before the Departments at Washington, by petition as aforesaid, the Philbrook heirs were also during these ten years—1870 to 1880—moving as best they could on their adversaries at Little Rock, to work up their claim in a reputed reconstructed

court or honorable compromise, under advice of learned, trustworthy attorneys of Little Rock bar, of Galesburg, Ill., and Washington, D. C., the claim, its legal and equitable standing, so presented as to be known and read of all men who had ears to hear, and clandestinely acting upon procuring any number of affidavits of recent citizens swearing they never heard of the Philbrook claim. What of it when borne upon the record and concealment hereinbefore mentioned and notice by the supreme courts? And they were also advised by their attorneys that there was legislative enactment and decisions by the Arkansas supreme court expressly
174 to beat said Philbrook heirs on a pretence of delay, and gave assurance relied upon that the like could not avail, for the delay was caused by the openly-declared acts of intimidation and violence by the said defendants actively and continuous from their first appearance in 1842 up to the record filing of the bill, January 30, 1883.

Meantime, to give notice to all persons interested that a renewed and vigorous move was entered upon to prosecute the claim based upon the New Madrid locations to a just and equitable termination, there appeared to silence the before-mentioned fifteen worthless, never-heard-of affidavits—the U. S. Senator Garland's brief—while it was patent, under providential dealings, that in all the aforesaid individual suits for twenty-five years with Philbrook heirs left out the spirit of the murdered Philbrook was then whispering the New Madrid locations, the record of Nathaniel
175 Philbrook title deeds, concealed under pleadings which so staggered and confused the courts, and which found utterance and imperishable record in the case of Cunningham *v.* Ashley and Beebe; and there appeared also upon the same record, at Little Rock, over forty trust deeds from the Philbrook heirs conveying their rights to trustees to facilitate their action; and, further, the said trustees prepared and put out a printed circular, here shown, giving an extended and complete claim of title in the Philbrook heirs from the New Madrid locations, the same appearing of record from the date thereof to the present and on exhibit as part hereof.

The same was replied to on the part of defendants by publication in the "Gazette," in terms of outrage, threatenings, and insult, sufficient warning, and belief that they could get into court only through a suit brought by the United States, a course adopted —
176 suggested by the supreme court — resisted and overpowered in violation of law-court rules, as hereinafter mentioned.

Your orator further states that under the order issued out of the Department of Justice, the same attached to the original bill instituting this suit in chancery, the preparation of the bill in equity was assigned to the attorneys for the petitioners, the trustees for the heirs of Nethaniel Philbrook, and for the well-known threatening attitute of the defendants as aforesaid the said attorneys thus acting under intimidation and restraint could not examine the public records and witnesses to find and state in the original bill the facts and circumstances since discovered and deemed important to come in by way of amendment.

The aforesaid attempted assassination of T. H. Ellison, the principal heir, and the fact that the long years of delay was caused
177 by the fraudulent acts of the defendants were known to said attorneys and omitted mentioned rather than blacken the memory of a deceased senator (Ashley Beebe), and in view of the premises the conclusion that the said trustees for the Philbrook heirs should not be made parties to the suit, having reason to believe that they would be slaughtered at the thresh*h*old of the court. That such course did exist will be shown from the fact that the defendants resisted and so overawed and intimidated the court to control its officers and resist the authority of the United States, and in violation of law prevented the filing of this suit for more than two months, to wit, from November 23, 1882, to January 31, 1883.

The combination alleged in the original bill to prevent the said Philbrook heirs by force*a*ble means from ever asserting their lawful rights in a court of justice, and the method adopted by assas-
178 sination, if need be, circumstantially set out and alleged herein which did actually deter, delay, and prevent any action in court or way open to compromise before the war; that taken in connection with the like policy of force and intimidation adopted and acted upon by the Beebe heirs in closing the courts here shown, they assume all the wrongs and outrages of their ancestors and become chargeable for the hinderance and delay whereby the Philbrook heirs were prevented from prosecuting their claim.

The said attorneys made no mistake in assuming that if the preparation of the bill was known to the Beebe heirs the filing thereof would be prevented. The bill was prepared in the usual way without first informing its adversaries, and, in conformity with the express directions of the Attorney General, was on the 23rd day of
179 November filed in the clerk's office, fees $65.00 paid, and time agreed upon for issuing subpœnas. The following day the clerk informed the Beebe heirs, who caused the filing instantly expunged, and the plaintiff, the United States, turned out of court, and the bill, the first appearance of the Philbrook heirs,— kicked about in the clerk's office, a hindrance in the face of the court for over two months, added to the forty-two years hereinbefore mentioned, and fixes the responsibility for delay and laches on the defendants from design successfully carried out.

While the said bill was thus held in derision for its helpless condition the plaintiff moved, by petition and motion, on the circuit judge for a rule on the clerk to compel him to perform his duty, wherein the state and conditions of the case are set forth and alleged, here shown, marked Exhibit "R," and asked to be made a part hereof. The said order prayed for on the clerk to issue
180 subpœnas was made January 3rd, 1883, and held in contempt, and finally, on January 31, an order from the Department of Justice settled the case on the records, with a continued adversary treatment, subject to a supplemental bill, to show with what forbearance the outrageous conduct of Ashley Beebe is stated herein as compared with the wild, vehement onslaught made by the defendants upon the highest Government officials, entitling them to no

consideration whatever; to show *with* what desperate, lawless means — used to prevent a trial on its merits, in procuring the Beebe patents, acting and pleading as of old "to be let alone."

The facts will not justify or excuse a pretense that the Beebe heirs would suffer wrong or call for sympathy for reason of delay, the said lands having increased in value, for it was their own contrivance, fraud, and violence that caused the delay; their own
181 option and choice. As aforesaid, forty-one years ago—1841— the Philbrook heirs appeared in the person of T. H. Ellison and laid their claim so clear and certain that it was admitted by assassination—believed—in lieu of which a compromise could have been effected by a return of the purchase-money—simply crumbs of flattery from their bounteous table, set with a million or more dollars, marked on the map before them.

It was in the presence of the above-mentioned title deeds and the administrator, W. E. Woodruff; in presence of Chester Ashley, Philbrook's partner in the New Madrid locations, of Roswell Beebe, and his bonded promise to execute a quitclaim deed, and in presence of the U. S. Land Department, and adversary hereto, the parties combined to destroy the New Hampshire ignorant children of the woods, the Philbrook heirs, if they offered to show title derived
182 from the New Madrid locations "within a reasonable time." Men of intelligence, Senators so endowed as to forecast coming events, — that they would make it too hot for said heirs; by a debased public sentiment for twenty years; then a fierce war for four years between the sections, after which the Beebe heirs would become rich and powerful by sale of lots and blocks, giving title they dare not be inquired of prior to 1839, though in somebody for twenty years, to interest five thousand citizens, *raped* in the same boat with them, taught to cry out, "There is nothing in Philbrook, and never was." To create great sympathy in that behalf, alleging that Philbrook heirs lay in wait for forty years for the city to be builded, then to take it in with immense booty, and finally to call up the Beebe slyly-inserted proviso, "if title is called for within a reasonable term," and so
183 slander, traduce, and vilify the Philbrook heirs *ex parte* for delay their own, and move on the court in sympathy to hold that said heirs have sinned away their day of grace while sleeping through in duress vile; and for this the United States can have no standing in this court, and Philbrook heirs need not apply and have not asked for place or favor only that the United States as plaintiff herein may be treated with fidelity, justice, and equity; that she may perform her obligations to the Philbrook heirs, assumed long years since, and in whose calender laches and stale claims never enter.

All of which is respectfully submitted, assigned to its proper place in the bill, as at first indicated.

Extract from the Attorney General's Order, Attached to Bill.

After the suit is commenced the counsel for the petitioners
184 will have the conduct and management of the case.
As such counsel,

CUMMINS & BAKER,
LIBERTY BARTLETT,
Attorneys, &c.

STATE OF ARKANSAS, } ss:
County of Pulaski, }

I, Liberty Bartlett, state that I am the attorney of the complainant in this action; that the claimant, the United States, is mentally incompetent of taking an oath, and that the Attorney General of the United States, under whose conduct this action is, is now absent from this State, and that I believe the statements made in the amended bill are true.

LIBERTY BARTLETT.

Sworn to and subscribed before me this 18th day of April, 1884.
RALPH L. GOODRICH, *Clerk,*
By W. P. FEILD, *D. C.*

Endorsed: Filed Oct. 13, 1883. Ralph L. Goodrich, clerk.

185 EXHIBIT "N."

Affidavit of T. H. Ellison.

STATE OF ILLINOIS, *Knox County:*

I, Thomas H. Ellison, being duly sworn, deposes and says that my name is Thomas H. Ellison; aged seventy-one years, and one of the heirs of the late Nathaniel Philbrook, who went to Little Rock, Ark., in 1820, and help- lay out the first town, where the city of Little Rock now stands. I reside in *in* the city of Galesburg, county of Knox, and State of Illinois, and have for twelve years past; was born in Old Durham, near Portsmouth, N. H., in 1812. My father died leaving two children, this affiant and a sister, younger. Afterwards, when about seven and my sister about five years, my mother died, leaving us orphans. A few months before my mother's death this affiant remembers Nathaniel Philbrook calling
186 to see my mother. She was his sister. He was on his way to Arkansas with James Miller, who had been appointed the first territorial Governor of Arkansas, as this affiant was informed. After the death of our mother my sister Mary and myself were taken by my grandfather, Eliphalet Philbrook, to live with him in Wakefield, Strafford county, New Hampshire, and were living with him in the fall of 1824, when a letter come to him from Governor Miller, of Arkansas, stating that Nathaniel Philbrook, my mother's brother, had been murdered at Little Rock, Arkansas, and had left a large property in real estate and money and it had fallen to his father, my grandfather. Soon after letters came saying that W. E. Woodruff

had been appointed administrator of Nathaniel Philbrook's estate, and in 1825 my grandfather, Eliphalet Philbrook, made his will, in which he gave two-sevenths of the property left by Nathaniel to my
187 sister Mary and this affiant, and during the following two or three years this affiant heard read and talked over by his grandfather several letters he had received from Wm. E. Woodruff, administrator, and among them one in 1828, a few weeks before my grandfather's death, in the presence of William Munson, now living, in which said Woodruff, in substance, said to grandfather he had Nathaniel's business all settled, all debts paid, and had $16,000 in money, and advised that the real estate be left, as the town was increasing, and that it would increase faster than the money any other way. Grandfather wrote him to pay all necessary expenses and send him the balance of the money; my grandfather died soon after, and no money ever came, and my grandfather's will was duly probated; this affiant was about sixteen and my sister about fourteen years of age when my grandfather died. After this, and my grandfather's will
188 had been duly probated, this Philbrook estate in Arkansas being constantly talked about by the heirs as it was represented by said Wm. E. Woodruff; so it was kept in mind and said Woodruff discontinued writing, and in the winter of 1840 and 1841 this affiant went to Little Rock, Ark., and soon found the administrator, and he went with me to the recorder's office and opened and looked into several books of record, then turned to me and said, Philbrook had no real estate there; it had all been entered by other parties. I then asked him what he had done with the money he wrote my grandfather about; he said he would go with me to the bank, and we went to the bank and he asked the man in charge for some one not in, and finally said to the man in charge that he wanted to show this young man, meaning affiant, that Philbrook had no money here, and the man in charge asked him what
189 he had done with the thousands of dollars Philbrook left in bank. Woodruff answered, "I paid that out for gambling debts," and the banker replied, "the hell you did." Woodruff turned and went out of the bank and I followed him, and I could get no further information from him.

This affiant remained there several days, and was shown the real estate left by Philbrook, and I became satisfied that this administrator, Woodruff, had turned against the estate, and becoming satisfied that I would get no further information from W. E. Woodruff, and finding the law firm of Cummings & Fowler favorably disposed I consulted them and gave them what information I had and they gave me the appearance that the Philbrook estate could be reclaimed, and offered very reasonable terms to undertake it. And here, in the winter of 1840'–41, was the first intimation the heirs had that Ashley, Beebe & Woodruff and others had
190 obtained patents for the same lands in the name of Roswell Beebe, in 1838 & '9, more than two years previous. Then, on further consultation with said attorneys, it was agreed that I should return North and consult with the other heirs, which I did do, and returned to Little Rock in the winter of 1841–'42; and shortly after

my return there, I should say within a week, I received three anonymous letters saying they knew my business and I had better leave; that I was there to stir up the Philbrook title, and if I did not leave in ten days I would get hurt, one of them said; another, that I would be in the bone-yard, and another, that I would never get home. I paid no attention to them, and after the time was out, if I remember correctly it was on the thirteenth day after I read the notice, I was shot, the ball striking me in my left groin, and has made me a cripple all my life. It took place on the opposite
191 side of the river, up about where the Iron Mountain R. R. bridge crosses into the city of Little Rock. I was asked by a young man to go with him hunting across the river. I had formed a little acquaintance with him, and I finally consented, and we took a boat and rowed across and about to the place named, where the bridge crosses, and tied up near a thicket of trees, and the man that was with me took the gun and went out to see what he could find, and I had got out the boat and went back and sat down in it and, it could not have been more than thirty minutes, I heard the discharge of a gun from the thicket and I was shot in the groin. Shortly — the man who went with me over came and found me and pretend- to feel very bad, but I have thought since that he was knowing to the plan to kill me, if he did not shoot me himself.
192 I was faint from loss of blood, and I found myself on the other side of the river in a shanty the next day, and some parties in it said they could not have me there, and I was taken to a house occupied by a portrait painter named Bird. I was at his place for eight weeks, and was doctored by an Indian doctor. When I was able to be helped to a boat I left.

The young man that was with me I never saw after that day. I was for years so affected by the bullet in my groin (and it is there still) it incapacitated me for active business, and I was so poor my family could scarcely live and the other heirs were fearful of their lives if they went to Little Rock and would not venture it.

After the war, in 1867, I went there and mentioned my business, that I was one of the heirs of the Philbrook estate, to some prudent men from the North that were there, and had been some time, and they advised me that I had better not make myself known
193 or my life would be in danger, in the rough and unsettled condition of the people so soon after the war, so I left, and in 1870 Charles Chandler, president of the First National Bank of Macomb, McDonough Co., Ill., was going to Hot Springs for his health, and William Munson, one of the Philbrook heirs, and myself employed him to stop at Little Rock, Arkansas, and look after the Philbrook estate, going or returning, and he reported to us, on his return, that he had spent some two weeks and got a lawyer to assist him, and he became satisfied they meant to kill him and he left, and that the Philbrook claim was good.

I can say, without fear of successful contradiction, that the bullet-and-shotgun policy of intimidation has prevented the settlement of the Philbrook estate.

I know it would have been put in process of settlement in
194 1841–'42 had I not been shot. I was there for that purpose.

T. H. ELLISON.

STATE OF ILLINOIS, *Knox County:*

Personally appeared before me, the undersigned, a county clerk in and for the county of Knox and State of Illinois, Thomas H. Ellison, who, being duly sworn, on his oath says he has heard read the foregoing affidavit by him subscribed, and that the same is true of his own knowledge, except as to those matters stated upon information and belief, and as to those he verily believes them to be true.

Witness my hand and seal this 10th day of February, 1883.

[SEAL.] ALBERT J. PERRY,
County Clerk.

195 STATE OF ILLINOIS, *Knox County:*

A. J. Perry, being duly sworn, says deponant is county clerk of Knox county, State of Illinois, and was called upon to go to the house of the late Thomas H. Ellison to swear him to an affidavit as his dying declaration in relation to the facts as he understood them in the Philbrook case at Little Rock, Arkansas.

This deponant saw the said Thomas H. Ellison sign the affidavit, and then this deponant step-ed forward and asked the said Ellison if the affidavit had been read to him, and he said it had. This deponant told him to hold up his hand, and this deponant administered the oath to him. This deponant heard him speak to Dr. Foot and his son, who were near him, and this deponant has no hesitancy in saying that the said Thomas H. Ellison was entirely com-
196 petent to make the affidavit. I attached the jurat and seal when I got back to my office.

ALBERT J. PERRY.

Subscribed and sworn to before me this 19th day of November, 1883.

GEO. L. HAUNAMAN,
Clerk Circuit Court, Knox Co., Ill.

197 *Affidavit of Geo. W. Foote.*

STATE OF ILLINOIS, *Knox County:*

Geo. W. Foote, being duly sworn, deposes and says this deponent is a physician by profession, and has been in practice as such in the city of Galesburg, Knox county, State of Illinois, for twenty-five years, and was the family physician of the late Thomas H. Ellison in his last illness for several weeks, once or twice a day at first and toward the last three times a day, and this deponant prescribed for him all the time during his last illness, and was well acquainted with his mental condition, and says that said Thomas H. Ellison had possession of all his mental faculties to the last and directed his store business all the time; his clerk came to the house every day for or-

ders. This deponent heard the deposition read to him on the
198 10th day of February, 1883, saw the late Thomas H. Ellison sign it, and saw him sworn to it by A. J. Perry, county clerk; and this deponent further says that said Thomas H. Ellison had the affidavit prepared in view of death as his dying declaration as to the facts in the Philbrook case pending at Little Rock, Arkansas, and died about six hours after. While his son read the affidavit to him he miscalled a date and he corrected him. The late Thomas H. Ellison had his mind, and competent to do business at the time he executed said affidavit.

GEO. W. FOOTE, *M. D.*

Subscribed and sworn to before me this 20th day of November, A. D. 1883.

[SEAL.] GEO. L. HANNAMAN,
Clerk Circuit Court, Knox Co., Ill.

199 EXHIBIT "C" TO BILL.

Deed. O'Hara & wife to James De Baum.

Know all men by these presents that William M. O'Hara and Susan O'Hara, his wife, for and in consideration of the sum of four thousand dollars to them in hand paid by James De Baum, of Arkapolis, in the Territory of Arkansas, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said James De Baum and to his heirs and assigns forever all his, the said O'Hara's, interest, right, and title in four certificates issued by Frederick Bates, Esq., recorder of land titles for the Territory of Missouri, pursuant to an act of the Congress of the United States relative to lands
200 injured by earthquake, passed on the 17th February, 1815, to wit: One certificate issued to Elois Dejarlois or his legal representatives, numbered two hundred and sixty-four (264); one certificate issued to Francis Lessieur or his legal representatives, numbered eight (8); one certificate issued to Peter Porier or his legal representatives, numbered fifteen (15), and one certificate issued to Henry Cockerham or his legal representatives, numbered one hundred and fifty-six (156); by virtue of which said certificates four tracts of land, containing altogether eleven hundred and twenty acres, were located by the said William M. O'Hara and others as the legal representatives of the said Eloi Dejarlois, Francis Lessieur, Peter Porier, and Henry Cockerham on the south side of the Arkansas river, near the Little Rock, so-called, which said tracts
201 of land so located are bounded on the north by the said Arkansas river and on the east by the Quapaw Indian line, excepting and reserving out of the said certificates and the lands located by virtue of them sundry tracts of land included therein heretofore sold and conveyed by the said William M. O'Hara, as by reference to the office of the surveyor of the lands of the United States for the State of Missouri and Territory of Arkansas and to the office of the recorder of deeds for the county of Pulaski, in the

said Territory of Arkansas, will more fully appear, and excepting and reserving also sundry tracts of land heretofore sold by the said O'Hara, but not yet conveyed to the persons to whom such sales were made, to wit: One tract of about fifty acres to William
202 H. Pierson or his legal representatives; one tract of about thirty acres to Andrew Scott; one tract of about thirty acres to Rufus P. Spalding; one tract of about five acres to Samuel Anderson, and one town lot to the said Samuel Anderson; also all the right, title, and interest of the said William M. O'Hara and Susan O'Hara, his wife, to a tract of land situate on the north side of the Arkansas river, near a place called Chrystal Hill, which said tract of land last mentioned includes the east fractional half of section numbered five, in township number two north, of range number thirteen west, of the 5th principal meridian:

To have and to hold the said certificates above described, with the said William M. O'Hara's and Susan O'Hara's interest, right, and title therein, and in the lands located by virtue thereof, and
203 also in the tract of land last described, unto him, the said James De Baum, his heirs and assigns, forever, to his and their only proper use, benefit, and behoof.

I- witness whereof the said William M. O'Hara and Susan O'Hara have hereunto set their hands and seals, at St. Louis, in the State of Missouri, this eleventh day of April, in the year of our Lord one thousand eight hundred and twenty-one.

WM. M. O'HARA. [SEAL.]
SUSAN O'HARA. [SEAL.]

Signed, sealed, and delivered in presence of—
HELEN DE CAPLAINE.
J. V. GARNIER.

STATE OF MISSOURI, *ss:*

Be it remem- that on the day of the date hereof, before Joseph V. Garnier, a notary public of the State aforesaid, duly com-
204 missioned, residing in the town of St. Louis, personally appeared William M. O'Hara and Susan, his wife, who acknowledge- the foregoing instrument of writing to be their act and deed for the purposes therein mentioned; and the said Susan, wife of the said William M. O'Hara, being by me examined separately and apart from her said husband, doth make her acknowledgment that she is well acquainted with the contents of the said deed and hath executed the same free from the compulsion or undue influence of her said husband.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at St. Louis, this twenty-third day of April, A. D. 1821.

[SEAL.] J. V. GARNIER, *N. P.*

ARKANSAS TERRITORY, *ss:*

205 I, Richard Menefee, deputy clerk for Alexander H. Rennick, clerk of the court of common pleas and *ex officio* recorder in and for Pulaski county, do hereby certify that the foregoing deed or instrument of writing was produced to me in my office on the third day of August, A. D. 1821, and is duly recorded in Book B, page 44, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of said —, at office, this thirtieth day of August, 1821.

[SEAL.] RICH'D MENEFEE,
Dep. Clerk for A. H. Rennick, Clerk.

STATE OF ARKANSAS, }
County of Pulaski, } *ss:*

I, J. L. Bay, clerk of the circuit court and *ex officio* recorder for the county aforesaid, do hereby certify that the foregoing
206 three pages and twenty-eight lines of writing is a correct, full, complete, and compared copy of the deed from William M. O'Hara and wife to James De Baum as the same appears of record in record Book " B," Deeds, pages, 44, 45, 46, & 47, now on file in my office.

In testimony whereof I hereunto set my hand and the seal of said court on this 19th day of March, 1883.

[SEAL.] J. L. BAY,
Circuit Clerk and ex Officio Recorder.

Endorsed: Filed June 18, 1883. Ralph L. Goodrich, clerk.

207 EXHIBIT " C^1" TO BILL.

Deed. J. De Baum to N. Philbrook.

Know all men by these presents that I, James De Baum, of Big Rock township, county of Pulaski, and Territory of Arkansas, for and in consideration of the sum of one thousand dollars to me in hand before the delivery hereof well and truly paid by Nathaniel Philbrook, of the place aforesaid, the receipt whereof I hereby acknowledge, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Nathaniel Philbrook, *to* his heirs and assigns, forever all my interest, right, and title in three certificates issued by Frederick Bates, Esqr., recorder of land titles for the Territory of Missouri, pursuant to an act of
208 the Congress of the United States relative to lands injured by earthquakes, passed on the 17th day of February, 1815, to wit: One certificate issued to Eloi Dejarlois or his legal representatives, numbered two hundred and sixty-four (264); one certificate issued to Francis Lessieur or his legal representatives, numbered eight (8), and one certificate issued to Peter Porier or his legal representatives, numbered fifteen (15); by virtue of which said certificates three tracts of land, containing altogether four hundred and eighty acres, were located by William M. O'Hara, of St. Louis, in the then Territory of Missouri and others as the legal representatives

of said Eloi Dejarlois, Francis Lessieur, and Peter Porier on the south side of the Arkansas river, near the Little Rock, which tracts of land are bounded on the north by the Arkansas river and
209 east by the Quapaw line, meaning to sell & convey unto the said Philbrook one undivided half part of all the right, title, and interest which I, the said De Baum, derived from William M. O'Hara and Susan, his wife, in and to the above certificates and lands located by virtue of said certificates by their, the said O'Hara and wife's, deed to me, dated the eleventh day of April, in the year of our Lord one thousand eight hundred and twenty-one, recorded in the recorder's office of Pulaski county, Arkansas Territory, in book "B," page 44, &c., the other half of said lands and certificates having been already conveyed to Chester Ashey by deed dated the eleventh day of October, 1821; to have and to hold all my right, title, and interest in and to the certificates above described, with all my, the said De Baum's, interest, right, and title in and to all the lands located
210 by virtue thereof to him, the said Nathaniel Philbrook, his heirs and assigns, forever, to his and their only proper use, benefit, and behoof, together with all the privileges and appurtenances to the same belonging, and all my, the said De Baum's, interest, right, and title to all improvements owned by me at Little Rock are hereby conveyed to said Philbrook.

In witness whereof I, the said De Baum, have hereunto set my hand and seal this eighteenth day of March, in the year of our Lord one thousand eight hundred and twenty-two.

J. DE BAUM. [SEAL.]

In presence of—
T. W. NEWTON.
JAMES MILLER.

TERRITORY OF ARKANSAS, } ss:
County of Pulaski, }

Personally appeared before the undersigned, deputy clerk
211 & *ex officio* recorder in and for the county of Pulaski, James De Baum, the grantor whose name is signed to the within deed, and acknowledged the same to be his proper act and deed for the purposes therein mentioned and contained.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Little Rock, this 18th day of March, in the year of our Lord one thousand eight hundred and twenty-two, and of the Independence of the United States of America the 46th.

[SEAL.] T. W. NEWTON,
D'y Clerk & ex Officio Recorder.

TERRITORY OF ARKANSAS, } ss:
County of Pulaski, }

I, Thomas W. Newton, dep'y clerk of the Pulaski C. court & *ex officio* recorder for said county, hereby certify that the within
212 and foregoing deed was produced to me in office on the 18th day of March, 1822, and is now recorded in Record of Deeds, Book B, page 296, &c.

In testimony whereof I have hereunto set my hand and affixed my seal, of office, at Little Rock, this 5th day of June, 1822, and of our Independence the 46th year.

[SEAL.] T. W. NEWTON,
D'y Clerk.

STATE OF ARKANSAS, }
County of Pulaski, } *ss:*

I, J. L. Day, clerk of the circuit court and *ex officio* recorder for the county aforesaid, do hereby certify that the foregoing three pages and fifteen lines of writing is a correct, full, complete, and compared copy of the deed from J. De Baum to N. Philbrook as the same appears of record in Record Book "B," pages 296 to 298, now on
213 file in my office.

In testimony whereof I hereunto set my hand and the seal of said court on this 22nd day of March, 1883.

[SEAL.] J. L. BAY,
Circuit Clerk and ex Officio Recorder.

Endorsed: Filed June 18, 1883. Ralph L. Goodrich, clerk.

214 EXHIBIT "C²" TO BILL.

Deed. J. De Baum to N. Philbrook.

Know all men by these presents that I, James De Baum, of Big Rock township, county of Pulaski, and Territory of Arkansas, for and in consideration of the sum of one thousand dollars to me in hand before the delivery hereof well and truly paid by Nathaniel Philbrook, of the same place, the receipt whereof I hereby acknowledge, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey, unto the said Nath'l Philbrook, *to* his heirs and assigns, forever all my interest, right, and title in and to a certain certificate and lands hereinafter named and described, to wit: All my right, title, and interest in a certain certificate
215 issued by Frederick Bates, Esqr., recorder of land titles for the Territory of Missouri, pursuant to an act of the Congress of the United States relative to lands injured by earthquakes, passed on the 17th day of February, 1815, to Henry Cockerham or his legal representatives, said certificate being numbered one hundred and fifty-six (156); by virtue of which said certificate a tract of land containing six hundred and forty acres was located by William M. O'Hara, as the legal representative of the said Henry Cockerham, on the south side of the Arkansas river, near Little Rock, so as to include all that part of section ten (10), in township numbered one north, of range numbered twelve west, of the fifth principal meridian, which is not included in a former location made by the legal representatives of Francis Lesseur; also all that part of the west half of fractional section numbered three (3), in the
216 township and range aforesaid, which is not included in a former location made by Stephen H. Long, as the legal representative of Peter Porier; also the southwest fractional section

numbered thirty-four (34), in township numbered two north, of said range numbered twelve west; also so much off the east end of the south fractional half of fractional section numbered thirty-three, in the township and range last aforesaid, as will make the quantity of six hundred and forty acres; also all my right, title, and interest in a certain tract of land situate on the north side of the Arkansas river, near the Chrystal Hill, so called, in Pyeatt township and county of Pulaski, being the same conveyed to me by *by* William M. O'Dara and Susan, his wife, by their deed dated the eleventh day of
217 April, in the year of our Lord one thousand eight hundred and twenty-one, meaning hereby to convey unto the said Nathaniel Philbrook, his heirs and assigns, one undivided half part of the certificate and lands above described, which were conveyed to me, the said James De Baum, by William M. O'Hara and Susan, his wife, by their deed dated the eleventh day of April, in the year one thousand eight hundred and twenty-one, recorded in the recorder's office of Pulaski county, Arkansas Territory, in Book B, page 44, &c., the other half of said lands and certificate having been already conveyed to Chester Ashley by deed dated the eleventh day of October, 1821:

To have and to hold all my interest, right, and title in and to the certificate and lands above described, with all my, the
218 said James De Baum's, interest, right, and title in and to the lands located by virtue of the above-named certificate, to him, the said Nath'l Philbrook, his heirs and assigns, forever, to his and their only proper use, benefit, and behoof, together with all the privileges and appurtenances to the same belonging, and all my, the said De Baum's, interest, right, and title to all improvements on the above-described lands, are hereby conveyed to said Philbrook.

In testimony whereof I, the said De Baum, have hereto set my hand and seal this eighteenth day of March, in the year of our Lord one thousand eight hundred and twenty-two.

J. DE BAUM. [SEAL.]

In presence of—
T. W. NEWTON.
JAMES MILLER.

TERRITORY OF ARKANSAS, } ss:
County of Pulaski, }

219 Personally appeared before me, Thomas W. Newton, deputy clerk and *ex officio* recorder in and for Pulaski county, the within-named James De Baum, grantor of the within deed, who acknowledged the same to be his proper act and deed for the purposes therein contained.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Little Rock, the 18th day of March, A. D. 1822, and of the Independence of the United States the 46th.

[SEAL.] T. W. NEWTON,
D'y Clerk & ex Officio Recorder.

TERRITORY OF ARKANSAS, } ss:
County of Pulaski, }

I, Thomas W. Newton, deputy clerk of the Pulaski circuit court & d'y recorder for said county, hereby certify that the within and foregoing deed was produced to me in office on the 18th
220 day of March, 1822, and is now recorded in Book "B," page 293, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Little Rock, this 4th day of June, in the year 1822, and of the Independence of the United States of America the 46th.

[SEAL.] T. W. NEWTON,
D'y Clerk & D'y Recorder P. C.

STATE OF ARKANSAS, } ss:
County of Pulaski, }

I, J. L. Bay, clerk of the circuit court and *ex officio* recorder for the county aforesaid, do hereby certify that the foregoing four pages and ten lines of writing is a correct, full, complete, and compared copy of the deed from Jas. De Baum to N. Philbrook as the same appears of record in Record Book B, pages 293, 294, 295, & 296, now on file in my office.

221 In testimony whereof I hereunto set my hand and seal of said court on this 20th day of March, 1883.

[SEAL.] J. L. BAY,
Circuit Clerk and ex Officio Recorder.

Endorsed: Filed June 18, 1883. Ralph L. Goodrich, clerk.

222 EXHIBIT "C³" TO BILL.

Power of att'y. Philbrook to C. Ashley.

Know all men by these presents that I, Nathaniel Philbrook, of Arkapolis, Arkansas Territory, for divers good causes me thereunto moving, have made, constituted, & appointed, & by these presents do make, constitute, & appoint, Chester Ashley my true & lawful attorney for me and in my name to sign my name & affix my seal as security for James De Baum as hereinafter specified, viz: The said James De Baum having, on the 5th day of September last, taken out letters of administration on the estate of Christian E. Zoeller, who died intestate, & given as his security to the bond for the faithful administration of said estate Elias A. Elliott & Samuel D.
223 Woollard: Now, if additional security should be required to said bond for the faithful administration as aforesaid, then & in that case I authorize my said attorney for me and as if I was personally present to sign my name & affix my seal as security to the said bond, & provided said administration granted to said De Baum should be set aside and new letters granted to him on said Zoeller's estate I hereby authorize my said attorney to sign my name & affix my seal as my act & deed to said bond as security for said De

Baum for the faithful administration of said estate, hereby ratifying and confirming whatever my said attorney shall do in my name for the purpose & purposes aforesaid.

In testimony whereof I have hereto set my hand & seal this 30th of October, 1821.

NATH'L PHILBROOK. [SEAL.]

224 TERRITORY OF ARKANSAS, } *ss:*
County of Pulaski, Big Rock Township, }

Personally appeared before me, Matthew Cunningham, a justice of the peace in & for the township aforesaid, the above-named Nathaniel Philbrook, who acknowledged the foregoing instrument of writing to be his voluntary act and deed for the purposes therein mentioned.

As witness my hand & seal this twenty-ninth day of October, A. D. 1821.

M. CUNNINGHAM, *J. P.* [SEAL.]

ARKANSAS TERRITORY, } *ss:*
County of Pulaski, }

I, Richard Menefee, deputy clerk of the court of common pleas and *ex officio* recorder in and for said county, do hereby certify that the foregoing instrument of writing was produced to me in
225 my office on the twenty-sixth day of November, A. D. 1821, and is truly recorded in Book B, page 100, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at office, the day last written.

R. MENEFEE,
D'y Cl'k & ex. Off. R'r.

STATE OF ARKANSAS, } *ss:*
County of Pulaski, }

I, J. L. Bay, clerk of the circuit court and *ex officio* recorder for the counties aforesaid, do hereby certify that the foregoing two pages and eight lines of writing is a correct, full, complete, and compared copy of the power of attorney from Nathaniel Philbrook to Chester Ashley, as the same appears of record in Record Book "B," pages 100, 101, & 102, now on file in my office.

226 In testimony whereof I hereunto set my hand and the seal of said court on this 20th day of March, 1883.

[SEAL.] J. L. BAY,
Circuit Clerk and ex Officio Recorder.

Endorsed: Filed June 18, 1883. Ralph L. Goodrich, clerk.

227 EXHIBIT "C 7" TO BILL.

Power Att'y.

H. Elliott, N. Philbrook, J. De Baum, & E. A. Elliott to C. Ashley.

Whereas William M. O'Hara has caused to be located four New Madrid claims at & near Little Rock, on the south side of the river, in the Arkansas Territory, & the said locations are now the property of Henry Elliott, Elias Austin Elliott, Nathaniel Philbrook, James De Baum and Chester Ashley; & whereas a pre-emption right has heretofore been granted to Benjamin Murphy by the register and receiver of Lawrence district, & which covers a part of the said locations; and whereas it is desirable to compromise & settle the said conflicting claims:

Now, therefore, know all men by these presents that we,
228 Henry Elliott, Elias Austin Elliott, Nathaniel Philbrook, & James De Baum, for divers good causes us thereunto moving, have made, constituted, & appointed, & by these presents do make, constitute, & appoint, Chester Ashley our true and lawful attorney for us & in our names to compromise, settle, & adjust the aforesaid conflicting claims & to convey, by deed or otherwise, such portion of said lands that are covered by said New Madrid certificates & the pre-emption right to the present owner — owners of said pre-emption right as our said attorney may deem meet & proper, provided said attorney do not convey more than one-half of the whole lands in dispute, and provided, also, that the lands so conveyed shall be conveyed in such manner that the interest of the several New Madrid claimants shall be in the same proportion in what may
229 remain to them as they at present hold in the whole, & we hereby ratify & confirm all deeds & conveyances executed for the purpose aforesaid in our names & hereby authorize to sign & seal all instruments executed in our names as aforesaid, & we do also hereby authorize said Ashley to give a bond in our names & affix our seals to the same for the purpose of binding us to execute writings in performance of such agreements as he may make to effect a compromise under the limitations above prescribed; and, provided said compromise is not effected, we hereby authorize said Ashley to appear for & on our behalf to attend a re-examination of the said pre-emption claim ordered by the Commissioner of the General Land Office & to act as an attorney in the investigaton of said pre-emption rights, & the register & receiver of Lawrence
230 district are hereby requested to receive said Ashley as the representative of the present owners of the New Madrid claims heretofore owned by William M. O'Hara, and we do hereby authorize our said attorney in lieu of the said one-half of the lands contained within the conflicting claims as aforesaid, if he shall think proper, to convey an equal number of lots in other parts of the New Madrid locations or, whenever our said attorney shall think proper, either in or without the said conflicting claims or a part within & a part without, as he may deem proper.

In testimony whereof we have here set our hands & seals this 29th day of October, 1821.

WITNESS.—A part of 12th line from beginning written on an erasure, and fourth line from top of this page partly erased, &
231 present owners of the "interlined;" the above noted before execution.

—— ——. [SEAL.]
HENRY ELLIOTT. [SEAL.]
NATHANIEL PHILBROOK. [SEAL.]
J. DE BAUM. [SEAL.]
E. A. ELLIOTT. [SEAL.]
—— ——. [SEAL.]

TERRITORY OF ARKANSAS, } ss:
Pulaski County, Big Rock Township, }

Personally appeared before me, Matthew Cunningham, a justice of the peace in & for the township aforesaid, the within-named Henry Elliott, Elias A. Elliott, Nathaniel Philbrook, & James De Baum, who severally and individually acknowledge the within instrument of writing to be their voluntary act & deed for the purpose mentioned therein, as witness my hand and seal this twenty-ninth day of October, A. D. 1821.

M. CUNNINGHAM, *J. P.* [SEAL.]

232 ARKANSAS TERRITORY, } ss:
County of Pulaski, }

I, Richard Menefee, deputy clerk of the court of common pleas, *ex officio* recorder in and for said county, do hereby certify that the within instrument of writing was produced to me, in my office, on the 26th day of November, in the year of our Lord 1821, & is truly recorded in Book B, page 98, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at office, this twenty-sixth day of Nov., 1821.

[SEAL.] R. MENEFEE,
D'y Clerk & ex Officio R'r.

STATE OF ARKANSAS, } ss:
County of Pulaski, }

I, J. L. Bay, clerk of the circuit court and *ex officio* recorder for the county aforesaid, do hereby certify that the foregoing three
233 pages and fourteen lines of writing is a correct, full, complete, and compared copy of the power of att'y from H. Elliott, J. De Baum, N. Philbrook, & E. A. Elliott to C. Ashley, as the same appears of record in Record Book "B," pages 98, 99, & 100, now on file on my office.

In testimony whereof I hereunto set my hand and the seal of said court on this the 19th day of March, 1883.

[SEAL.] J. L. BAY,
Circuit Clerk and ex Officio Recorder.

Endorsed: Filed June 18, 1884. Ralph L. Goodrich, clerk.

234 EXHIBIT "C[8]" TO BILL.

Assent to Compromise at Little Rock.

This instrument, made the 28th day of December, 1821, witnesseth: That whereas Chester Ashley, acting for himself and attorney-in-fact for James De Baum, Nathaniel Philbrook, Elias Austin Elliott, and Henry Elliott, by virtue of a power of attorney, effected a compromise of their conflicting claims with William Russell, Henry W. Conway, Robert Crittenden, Robert C. Oden, William Trimble, Joseph Harden, and Thomas P. Eskridge in certain lands situate on the south side of the Arkansas river, being fractional section number two and northeast fractional quarter of section number three, of township number one north of the base line, and range num-
235 ber twelve west of the fifth principal meridian, and in completion of said compromise a deed was executed by said Russell, Conway, Crittenden, Trimble, Oden, Eskridge, and Hardin to Chester Ashley for certain blocks and lots in the town of Little Rock located on the land aforesaid, dated the twenty-second day of November, 1821; and also another deed of same date as last was executed by Chester Ashley for himself, and as attorney-in-fact for said Philbrook, De Baum, Henry Elliott, Elias A. Elliott, to said Russell, Conway, Crittenden, Oden, Trimble, Hardin, and Eskridge, conveying to them all the rest and residue of said fractional section two and fractional quarter section three, except those blocks and lots aforesaid conveyed as aforesaid to said Ashley; and whereas we, the undersigned, are desirous to ratify and confirm the above-
236 mentioned compromise in every particular, and to obviate all objections against the same in consequence of any provisions in the said power of attorney to said Ashley in every other respect, this instrument therefore witnesseth that we, the undersigned, for value received, do hereby ratify and confirm the aforesaid compromise in manner, form, and substance, as the same has already been made, and *graar*tee the fulfilments of all the engagement- entered into by said compromise effected as aforesaid.

Given under our hands and seals the *the* day & year above written.

CHESTER ASHLEY. [SEAL.]
HENRY ELLIOTT. [SEAL.]
J. DE BAUM. [SEAL.]
NATH'L PHILBROOK. [SEAL.]

TERRITORY OF ARKANSAS, }
Pulaski County, Big Rock Township, } *ss:*

237 Personally appeared before me, Mathew Cunningham, a justice of the peace in and for the township aforesaid, the above-named Chester Ashley, Henry Elliott, Jas. De Baum, & Nath'l Philbrook & personally acknowledged the foregoing instrument of writing to be their individual act and deed, voluntarily given, for the purposes therein mentioned.

As witness my hand and seal this 28th day of December, A. D. 1821.

M. CUNNINGHAM, *J. P.* [SEAL.]

TERRITORY OF ARKANSAS, } ss:
County of Pulaski, }

I, Thomas W. Newton, d'y clerk of the circuit court & *ex officio* recorder for the county aforesaid, do hereby certify that the within and foregoing deed was produced to me in office on the 26th
238 day of April, 1823, and that the same is now truly recorded in Record Book "C," page 145, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of office, at Little Rock, this 1st day of May, A. D. 1823, and of the Independence of the United States of America the 47th.

T. W. NEWTON, *D. C.*

STATE OF ARKANSAS, } ss:
County of Pulaski, }

I, J. L. Bay, clerk of the circuit court and *ex efficio* recorder for the county aforesaid, do hereby certify that the foregoing two pages and twenty-five lines of writing is a correct, full, complete, and compared copy of the ratification of compromise with Russell *et al.* as the same appears of record in Record Book "C," pages 145, 146, 147, now on file in my office.

239 In testimony whereof I hereunto set my hand and the seal of said court on this 24th day of March, A. D. 1883.

[SEAL.] J. L. BAY,
Circuit Clerk and ex Officio Recorder.

Endorsed: Filed June 18, 1883. Ralph L. Goodrich, clerk.

240 And on October 20, 1883, the following proceedings were had, to wit:

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Come the defendants, J. W. Martin and wife, by U. M. & G. B. Rose, J. M. Moore, and Clark and Williams, Esqs., their solicitors, and by leave of court file herein their demurrer.

The district judge did not sit during this proceeding.

Which demurrer is as follows:

In the United States Circuit Court for the Eastern District of Arkansas.

THE UNITED STATES OF AMERICA, Plaintiff,

v.

CHARLES W. BEEBE *et al.*, Defendants.

241 Come the defendants, Joseph W. Martin and Emma Martin, his wife, and demur to the amended bill filed herein, and for cause of demurrer they say:

1. It appears from the face of the said amendment that it does not change the case as stated in the original bill, to which a demurrer has been sustained by the court, and said amendment shows on its face that the plaintiff has no equity to maintain this suit.

2. It also appears that the plaintiff has no interest in the prosecution of this suit, and that if it has any interest in the subject-matter of the suit it is one in common with that of the defendants named herein.

3. It appears on the face of said bill and the amendment thereto that the claim sued upon is stale and such as a court of equity will not enforce.

4. It appears by the face of said bill and the said amendment that there are many persons who live on the land described
242 in the bill who are not made parties herein.

U. M. & G. B. ROSE,
J. M. MOORE,
CLARK & WILLIAMS, *Sol's.*

I, Joseph W. Martin, say that the foregoing demurrer is not interposed for delay.

JOSEPH W. MARTIN.

Sworn to and subscribed before me this 20th day of October, 1883.
RALPH L. GOODRICH, *Clerk.*

In our opinion the foregoing demurrer is well founded in point of law.

October 18, 1883.

U. M. & G. B. ROSE.
J. M. MOORE.
CLARK & WILLIAMS.

Endorsed: Filed October 20, 1883. Ralph L. Goodrich, clerk.

And on October 22, 1883, as follows:

243 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas begun and holden on Monday, the 22nd day of October, anno Domini one thousand eight hundred and eighty-three, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on October 22, 1883:

UNITED STATES
v. } 520.
CHAS. W. BEEBE *et al.*

Comes W. C. Ratcliffe, adm'r, &c., by U. M. & G. B. Rose, Esqs., his solicitors, and files herein his plea and motion to dismiss; also

comes Kate Faust, by said attorneys, and files herein her motion to dismiss.

The district judge did not sit during this proceeding.

Which plea is as follows:

244 In the United States Circuit Court for the Eastern District of Arkansas. In Equity.

THE UNITED STATES, Plaintiff,

v.

CHARLES W. BEEBE *et al.*, Defendants.

Comes the defendant, William C. Ratcliffe, as administrator of the estate of Cora F. Faust, deceased, and for plea to the amended bill herein he says that the cause of action of the said supposed heirs and representatives of Nethaniel Philbrook, deceased, has not accrued at any time within seven years next before the commencement of the present suit; wherefore he prays to be hence dismissed with his reasonable costs and charges.

U. M. & G. B. ROSE,
J. M. MOORE,
CLARK & WILLIAMS, *Sol's.*

I, William C. Ratcliffe, say that the foregoing plea is not
245 interposed for delay and that it is true in point of fact.

W. C. RATCLIFFE.

Sworn to and subscribed before me this 22nd day of October, 1883.

RALPH L. GOODRICH, *Clerk.*

We certify that, in our opinion, the above plea is well founded in point of law.

March 6, 1883.

U. M. & G. B. ROSE.
J. M. MOORE.
CLARK & WILLIAMS.

Endorsed: Filed October 22, 1883. Ralph L. Goodrich, clerk.

Which motion to dismiss is as follows:

In the United States Circuit Court for the Eastern District of Arkansas. In Equity.

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Comes the defendant, William C. Ratcliffe, as administrator
246 of the estate of Cora F. Faust, deceased, and moves the court

to dismiss this suit, on the ground of the want of proper parties, as set up in his plea herein, filed on the 5th day of March, 1883.

U. M. & G. B. ROSE.
J. M. MOORE.
CLARK & WILLIAMS.

Endorsed: Filed October 22, 1883. Ralph L. Goodrich, clerk.

Which motion of Kate Faust is as follows, to wit:

In the United States Circuit Court for the Eastern District of Arkansas.

UNITED STATES, Plaintiff,
v.
CHARLES W. BEEBE *et al.*, Defendants.

Comes the defendant, Kate Faust, and moves the court here to dismiss the amendment to the bill herein, and the whole suit, because it appears that this suit is based on a stale claim
247 that cannot be enforced in equity and good conscience; and, second, because it does not appear that this suit is prosecuted by the Attorney General of the United States or that said amendment is filed by his direction.

U. M. & G. B. ROSE,
J. M. MOORE,
CLARK & WILLIAMS, *Sol's.*

Endorced: Filed October 22, 1883. Ralph L. Goodrich, clerk.

And on December 3, 1883, the following proceedings were had, to wit:

UNITED STATES *v.* CHARLES W. BEEBE *et al.*

Comes the United States, by Cummins and Baker and Liberty Bartlett, Esq's, her solicitors, and files herein her replication
248 to defendants' pleas to amended bill, and also motion to set demurrers and pleas down for hearing.

The district judge did not sit during this proceeding.

Which replication to defendants' pleas to amended bill is as follows, to wit:

Reply to Plea, Statute of Limitations, and Stale Claim.

In Circuit Court, Eastern District of Arkansas.

UNITED STATES, Plaintiff, *vs.* CHAS. W. BEEBE *et al.*, Defendants.

Complaint in equity.

The said plaintiff, as to the said plea of said defendant, W. C. Ratcliffe, as administrator of the estate of Cora F. Faust, deceased, that this claim is stale and did not accrue at any time within seven years next before the commencement of this action, saith that the

said plaintiff, by reason of anything by the said defendant in its said plea alleged, ought not to be barred from having and
249 maintaining its aforesaid action thereof against the defendant and defendants to this action, because he says that, on the 7th day of June, 1838, and on the 25th day of September, 1839, the United States issued three patents to the lands described in said bill of complaint to Roswell Beebe, which said patents were issued by mistake and under a misapprehension of the law and facts, which said mistake and misapprehension was caused by the false and fraudulent representations and fraud of said Beebe; that said Beebe was not entitled to the said patents at the time the said same were issued and is not now; that said Beebe, his heirs and legal representatives, have been requested to return and surrender said patents to the United States that the same might be cancelled, but that they have refused to do so; that this action is instituted by the United States for its sole benefit and not for the benefit of any person
250 or persons to cause the said fraudulent patents to be vacated, delivered up to the United States, and cancelled.

That no lapse of time or statute of limitation runs against the United States, and it is not barred from having and maintaining her said action, all of which said plaintiff is ready to verify; and, as to said defendants' allegation of stale claim, the cause of delay in instituting suit herein charg-able to the fraud, concealment, and violent acts of the defendants and co-conspirators was set forth and alleged in the petition of the Philbrook heirs, with prayer to move as in this action, whereof the said defendants were served with notice and appeared by attorney in 1877, filed an answer pleading to delay allegations, argued and duly submitted, whereupon the Department of Justice found the Interior reports duly made; that it was not a stale claim, but one whereof public justice demanded a suit brought in the name of the United States, which was accordingly
251 done. Thus was the question of stale claim solemnly adjudicated by a competent and legally authorized jurisdiction, and the question finally disposed of, as well declared and held the law to be in the printed answer, brief, and argument of said defendants, and filed before the Secretary of the Interior in 1877, and again in the Department of Justice on the first filing bill in this case, 1882, where, on p. 24, defendants assent the law to be as follows: "The doctrine of *res adjudicata*, so well known and recognized in the courts, has no less a standing and recognition in the departments. Indeed, in all things and in all kinds of cases the departments place it precisely where the courts do." Thus a dose of their own medicine takes the life out of stale claim.

Notwithstan ling the law and the facts so found and acted upon by the U. S. Attorney General, as advised by the Secretary of the Interior, the said defendants have sought every opportunity,
252 in order and out of order, to vilify, to cast reproach and a stigma upon, Attorney General Brewster, personal and official, for having the moral courage to perform his official duty; stigmatised under a pretense of having taken up and prosecuted a stale claim, and, from the commencement, at every turn in the case in

pleas, motions, demurrers, &c., thrust in the face of the court, charging stale claim, when knowing perfectly well that the disability to prosecute the claim was in the ancestry of and continued by the said defendants, and to disabuse the mind of the court from suspicion, even, that the said plaintiffs had improperly taken up a stale claim, treated as wanton cruelty; that leave was obtained to amend the bill and present to the court the true inwardness of the acts which imposed a disability on the claimants to sooner institute proceedings to enforce their rights, however hard the records thereof might fall on the pride of said defendants;
253 that the circumstances of the fraud and violence are set forth and alleged, so that, aside from the finding in the Department of Justice, *that* lapse of time which might be construed as staleness was accounted for in a way that to impute stale claim to the Attorney General would be in contempt of a co-equal judicial finding; that the further showing is made to the court here that the stale claim allegation has no merit, cannot be maintained, and should be treated in a way to rebuke parties fierce and furious in measures to profit by their own violence and wrong-doing, all of which the said plaintiffs are ready to make appear.

And, further, the said defendants state, in a paper filed herein as a demurrer, that *that that* "the amended bill does not change the case, as stated in the original bill, to which a demurrer has
254 been sustained," calling out this state of facts and conditions. On the first appearance the said defendants came by stealth and charged stale claim put on Philbrook heirs, who were not pleaded as parties plaintiff and had no opportunity to plead, discuss, and show, as in the amended bill, their disability to prosecute during all the years of oppression and violence, when every avenue to a court of justice was guarded against by an organized armed force, so advised and treated; neither laches or stale claim could apply to the said plaintiff, the United States, for it appear-d on the face of the bill that she moved the moment she had knowledge of the frauds committed against her. The Philbrook heirs had shown the departments how the delay happened by defendants; answered, demurred, and adjudicated time and ways as aforesaid, and by the said plaintiff deemed sufficient without even the smell of staleness;
255 hence the unsatisfactory opinion without hearing both sides on the question of staleness.

And the court gave leave to amend the bill and show the cause of disability, as set forth therein, held to be in the nature of a new trial, and this is what sorely afflicted the said defendants; so the moment *the moment* the amended bill was filed they filed a demurrer, and from the arbitrary position assumed said they had submitted the case and sent the papers on to Judge McCrary, at Keokuk, Iowa, and instructed the judge what decision to make, which was properly rebuked.

The said defendants, taking advantage of improperly smuggling in the Philbrook heirs to create an order of staleness, induce- the court to believe and say that the witnesses of the transactions refer-ed to were all dead many years since, which is notoriously false

by a score or more, and, if true, the loss would work the
256 greater hardship upon the plaintiff, as it was intended by imposing the disability it should work.

The fact appears in the bill and admitted on demurer that as soon after the war as the belligerent elements had become settled, in 1870, the Philbrook heirs made a vigorous effort to prosecute their claim; appeared on their inheritance at Little Rock, Ark., when the threats and violence of 1842 gave warning to leave; that the courts would be closed to them. Whereupon they moved by petition on the Government, 1872, and therein continuous up to the institution of this suit, in 1882, from the first, 1842, to the last there was not a day taken, in a legal sense, where the Philbrook heirs slept on their rights or to give the defense or the court *of* properly advised, the least ground to put upon the United States the badge of a "stale claim."

This claim was on record, known to the defendants, and
257 as to staleness, consider, in view of said heirs, move in 1870, no time could count from the beginning of the war, then, aside from the violent expulsion in 1842, and it would leave less than 20 years to count for staleness. The defense used the Philbrook heirs, though improperly, to daub the plaintiff with stale claim. It is proper to refer to them, as set out in the amended bill and herein, to show that the Government did not undertake in a stale claim, and that the lapse of time was fully accounted for and adjudicated before the Secretary of the Interior and passed to the Department of Justice.

As to the false assertions that the witnesses are all dead, we recall the aforesaid brief and argument filed in the Department of the Interior in 1877, wherein witnesses, by leave, testify in behalf of the defense and against the petitioners, Philbrook heirs,
258 and a portion testify that they were living in the city prior to 1838–'9, the date of Beebe patents, and all but three are living now, leaving sixteen living witnesses ready to testify on behalf of the defense; and still they will crucify the Philbrook heirs and the Attorney General to avoid going to trial, and have the audacity to declare the courts to have been open to the Philbrook heirs all the past sixty years.

If the defense could thrust the United States out of court and keep her out for two months in 1882, where would the Philbrook heirs appear at any time the past forty years? And for the indifference or absolute indifference or absolute resistance of the court the plaintiff, the United States, was reinstated only by the resistless mandate of the Attorney General, to be in turn assaulted personally
259 with all the polluted lip force of attorneys adjudicated contemptible to stamp him out from the presence of the court as at present constituted, and now come again with a plea in contempt that should be stricken from the files.

The said defendants answer to the petition of the Philbrook heirs touching lapse of time shown in their said brief, and — argument give the testimony of eight witnesses who swear they lived in Little Rock years before the issue Ashley-Beebe patents, in 1838–'9, and of necessity occupy parts of the land in question; derived title from

Ashley-Beebe, and knew all about the manner of proceeding provided for in the Beebe bond.

And of the eight or ten title deeds of N. Philbrook covering the same, borne upon the public records, notice to the whole world, the past twenty years and superior to any subsequent loca-
260 tions; and the further fact that in the six hotly-contested suits by subsequent locations that if the rights of Philbrook heirs were known they must make the parties to suits to quiet their pretended title, knowing they were 1,500 miles away in New Hampshire, and as the facts appear they conspire and agree to shut their eyes to the record of Philbrook title deeds, and if a Philbrook heir ever appears to look after his estate they would put him where dead men tell no tales, which they supposed they had done, and after many years of contest between themselves, standing guard against said heirs appearing, sixteen are prepared to swear the number of years they lived in Little Rock and never heard of Philbrook claim in the face of the aforesaid record. What if they had not heard of it; the claim existed nevertheless, and suppose they forgot to
261 put the record holders of the New Madrid locations as parties in the six suits to settle the right of subsequent locators of which said heirs knew nothing and were in unlawful duress; it could not affect their rights and must have their day in court.

It is deemed proper to consider the sixteen affidavits refer-ed to, which they ask to be taken as part of their defense. They all go to the same point, and bad as accumulative and good showing; the defense have nineteen living witnesses, when they induced the court to believe they were all dead; not one left to tell the tale.

The first appearing, W. E. Woodruff, located here in 1819, a year before said Philbrook, an intestate friend, and as such administered his estate and still lives. W. W. Adams was register of Land Office; has lived here 53 years from 1835, three years before pate nts
262 were issued. Jas. A. Martin, land surveyor from six years before patents issued. M. H. Eastman from 1836, two years before first patent. John C. Pray from 1825, the year after Philbrook died, sheriff and deputy clerk, and two years after his deeds were recorded. S. H. Tucker located here in 1833, five years before patents issued and frauds, if any, were committed. Thos. Fletcher lived here fifty-one years, seven before patents issued. L. E. Barber came in 1841, the same year the principal heir of Philbrook, T. H. Ellison, appeared to prosecute their claim, and by chance might find the records, was shot, supposed, to death, so they would never hear of the claim and it was banished from memory.

The point attempted to be made here was the above eight witnesses state they never heard of the Philbrook claim, and three of them, Eastman, Pray, Tucker, and Fletcher, testify that they never heard of the heir, Ellison, being shot, leaving the presumption
263 that the other four had heard of it, or they would answer the same way. There are twelve other witnesses, names given, coming at a later period, who testify to the same two points and to the same effect. Neither one deny hearing of said Ellison being shot, for most everybody for years after talked about it and reported that he

died on his way home, so that when he returned here in 1870 a cripple he had to prove his identity to ex-Gov. Conway, so sure was he that said heir died from his wound on his way home, and he dare not make this exhibit of himself till he had prepared a way of escape from the city the same day, — informed and believed that remaining overnight the threat of 1842 would be put in execution.

And in after years while moving in the Departments at Washington, 1872 to 1880, he made several visits to Little Rock, always
264 in disguise; for threats made he dared not appear openly to examine the records. A great hardship and wrong befel- the said heirs from the aforesaid wanton obstruction in the way of filing the bill for more than two months. The said T. H. Ellison came to be 71 years of age, enfeebled by the terrible gunshot wound, was failing in health so he had to take to his room, when the said bill was cast out of the records, and said Ellison dangerously ill, and his evidence of the utmost importance in this case. To take his deposition notice must be given the defendants, hence the attorney moved with all force and legal tactics they knew how for a rule on the clerk to make legal service on the defendants, at the same time the friends and doctors watching the mind and sinking condition of the unfortunate Ellison with a notary at hand, while failure
265 after failure came to the extraordinary moves to compel the clerk to perform his duty. At length the Attorney General, advised at every step, resolved to strike down this lawlessness and his order caused the subpœnas to issue, and on nearly the same day in the afternoon the upright Christian, Ellison, feeling that his end was near, with surroundings most solemn and touching, with his mind as clear as day, as verified by attendants, said T. H. Ellison gave his testimony in this case as his dying declarations in the form of an affidavit, duly attested, and on the same evening at eleven o'clock said T. H. Ellison departed this life. The said affidavit as dying declarations is here shown, marked Exhibit "N," and prayed to be made a part of this case.

That the defendants are deprived of a cross-examination from their own arbitrary, overbearing acts exercised in the intimi-
266 dation and control over the circuit clerk restrained from the performance of a sworn duty enjoined by law and by special contract to issue subpœnas on a given day, to wit, November 27th, 1882, and the defense may well rejoice and be glad that their nineteen unprecedented, disjointed affidavits have such a worthy following, by which means they may gain for them a standing as evidence in the case.

And of the said witnesses called, but three have since (1877) departed this life, to wit, John Wassell, J. W. Faust, and G. A. Gallagher, leaving sixteen open to a cross-examination; and, further, the defense introduce as a living witness ex-Gov. H. M. Rector, who knew and remembers the entire history of the Ashley-Beebe transactions connected with said Beebe patents, and also puts in
267 the case the litigation of Rector *vs.* Ashley, reported in 20 Ark. and 6 Wall., and that long litigation between Cunningham *vs.* Ashley, 14 Howard, and saying of Gov. Rector that "for several

years he was surveyor general of the State and presumably well known of the records of titles in this State;" and we say more especially the lands in question, for that was the grounds of his suits, and then they say in all this long litigation "no mention is made of Philbrook title nor of any one claiming under him." Why should they? What would be the effect? The record showed that the Philbrook New Madrid locations were older by years and superior to any subsequent location, and the moment the Philbrook claim was mentioned and the record shown their case would go out of court. The court say so in Cunningham *vs.* Ashley.

If proceeding according to law to quiet their title, if they
268 had any. And by the record, as they say, Rector, surveyor, knew it to be they would pray for Philbrook heirs to be made parties, and obtained service on them in New Hampshire; they knew their domicil, but the prize bid for was a million dollars or more, the inducement to conceal, hide away, and forget Nathaniel Philbrook and the title deeds covering the capital city he left upon record the day he fell by the assassin's bullet. Why should they sp-ak of and raise up a party with a record that will surely supercede them bearing the seal of the United States?

The scheme concocted and executed in the outset, the self administrator of Philbrook estate, the patentees, the said fierce litigants, subsequent locators, has worked well to conceal the fact and forget that Philbrook ever had an existence or left an estate in Little Rock.

269 They excelled in strategy. Twenty years of shifting and changing inhabitants and his name and estate never mentioned. They talk by signs and cyphers. At first (1824) the administrator informed the father in New Hampshire of his son Philbrook's death, leaving a large estate. Then a scheme intervened and for twenty years kept the heirs in ignorance of their rights and interest, and on first appearance by said T. H. Ellison, evidently by concert of action, and like his ancestor, falls by an assassin. Then comes fifteen or twenty affidavits, all in nearly the same words, showing concert, and how completely they put Philbrook and his estate out of sight; all with one accord say they never heard of Philbrook claim till recently, bearing date in 1877. Now, the circumstances related and the fact that no mention was made
270 by subsequent locators is proof indubitable of the Ashley, Beebe, Woodruff, and others unknown combination, to secrete, destroy the evidence of, to sink in oblivion, and beyond recovery or mention, the Philbrook claim. This is but negative testimony at best, never in the way of hearing or to remember an injurious mention, while two or more other witnesses may have had an extensive acquaintance therewith. It must have been well known and discussed in the Land Department in 1838–'9. When the Beebe patents were issued in consideration thereof said Beebe was required to give bond to indemnify all holding under Philbrook title by giving a quitclaim deed, which was made to Chester Ashley and others, conditions anticipated on the appearance of the Philbrook heirs

holding the certificates under the New Madrid locations, the
271 same referred to by the court in Cunningham *vs.* Ashley, saying of the New Madrid locations must have their day in court, the same introduced by the defense as part of their case, carrying more on its face than appears at sight, the court saying quizzingly that prior location is not mentioned in the pleadings, and the defense say that the Philbrook claim is not mentioned in either of these cases, the reason is now apparent; finding from the records that it was older and better than their subsequent locations, and to mention would end their case.

The fact of the Philbrook claim was held in secret, not mentioned in all these years, would not be deemed important only as the defense has made it so by calling fifteen witnesses to swear they were living close by and never heard of it. From what appears
272 they should put the inquiry to the aforementioned parties who combined, colluded, and contrived together to take up and convert to their own use the capital city, owned, occupied, laid out, and in the name of N. Philbrook, deceased, the administrator consenting thereto—parties bound to answer for Philbrook heirs fifteen hundred miles away taking control over their appearance or non-appearance to be or not to be at their bidding—expelled from their presence and not one left to mention the Philbrook claim having an interest therein.

Further as to how it happened that the Philbrook title was oblivious during all these years by applying another dose of their own medicine prescribed by the LL. D. of the aforesaid brief and argument, page 15, to wit: "Philbrook's titles begins by two deeds from De Baum in 1822. But here arises a question. Where does
273 De Baum begin? What is his right?" A pertinent question for the lands must be in somebody somewhere. It was probably derived from the Quapaw Indians, for it was only four years before this, 1818, that the Indian title was extinguished by treaty. There is a living witness, W. E. Woodruff, the adm'r, that can tell all about this. Now, come home and apply the rule to a like case, their own. The records show that the present occupants of the lands in question derive their title from the heirs of Roswell Beebe, deceased. "But here arises a question." When and from whom does Beebe derive his title? Twenty years have elapsed—1818 to 1838—during which said lands were owned, occupied, lots and blocks being bought and sold, title changing perhaps every day in parts thereof, and the title deed duly recorded from which a chain of title may be traced from the extinguishment of the Quapaw
274 Indian right of possession as hunting ground in 1818 up to 1838, when they, like Philbrook title, suddenly drop into oblivion. Not one left to mention their sad end, and since that nearly the entire city has changed hands. There are land agents who have made it a business to make an abstract of title to every lot and block in the city and they all end in Roswell Beebe in 1838–'9, as if that was the beginning of creation, and the people at large, ignorant of the motive, have acquired in that abrupt ending of title.

And the defense have not dared to permit an inquiry or mention beyond that self-constituted dead-line, knowing it would lead directly to the mention and establishment of the Philbrook New Madrid locations and many lots and blocks, the title derived from the said Philbrook and so held to this day. And here arises another
275 important question. On the same public records where title deeds derived from Beebe and his heirs were recorded, the bond of said Beebe, executed by the United States, which required Beebe to execute a quitclaim deed to all persons showing a chain of title derived from the New Madrid locations, thus acknowledging the validity of the New Madrid locations, and the fact appears that more than a hundred lots and blocks were so held under a compromise with Wm. Russell. Now, why should not subsequent deeds of conveyance go behind the Beebe patent issue and recite these conditions precedent, and aver and show that the condition had been complied with?

These conditions were made of record in 1839, and in 1841 the Philbrook heirs appeared in the person of T. H. Ellison to assert their rights, called the administrator, W. E. Woodruff,
276 his heirship recognized, and lest these conditions should be discovered as well as the evidence of their claim, the aforesaid combination set about shadowing said Ellison at every step till laid upon a supposed death-bed from a gunshot wound, cut off from hearing of or finding the said conditions put upon said Beebe touching upon the Philbrook New Madrid locations, and never did learn the conditions till moving on the Departments at Washington, D. C. in 1877.

The plea of defendants assenting that the said amended bill adds nothing to the original which was disposed of on demurrer—in effect, that the latter is a mere repetition of the former bill, and must fall under a like demurrer, the coming in of which should be accompanied with the sounding of a fog-bell.

Its aim or design is not apparent and calls for this reply
277 to be further extended. Design appearing only in this. They put Philbrook heirs in the original bill to show, unexplained, the United States took up a stale claim. It having answered their purpose, now they will put them out so they cannot come again. They will not be permitted to do that and take advantage of their own wrong.

In framing the original bill it was held that the lapse of time could not be pleaded against the Government. Besides, the disability imposed on Philbrook heirs by the defense was shown, answered on twelve printed pages aforesaid, and adjudged by the Department of Justice that the claim was not stale; hence the disability was not alleged in the original bill. The defense came, pleading stale claim *res adjudicata*, and submitted eighty-eight cases, when each in nearly the same terms like the aforesaid nineteen
278 affidavits decided the peaceful, quiet sleeping on a claim for from forty to one hundred years was ruled to be a badge of staleness and so applied to this case on the further ground that the witnesses were all dead. On review it was found that the said 88

cases were where disability was neither alleged or shown, but intimates that when this is shown pleaded it removes the badge of staleness, and on leave the aforesaid amended bill was filed, and wherein it differs from the original bill it sets out the circumstances of the frauds alleged therein and the way opened for it by the defense calling in said Philbrook heirs. It is alleged and set out in detail the names, as far as known, time, inducement, way, and means of parties combined and conspiring together to capture and convert the lands and estate of Nathaniel Philbrook, deceased,
279 to destroy the records and prevent the heirs known to be 1,500 miles away from finding the evidence thereof sufficient to institute legal proceedings thereon, so set forth in said amended bill specifically what were the impediments to an earlier prosecution of the claim, how they came to be so long ignorant of their rights, and the means used by the defendants to fraudulently keep them in ignorance, the design executed of a plot to murder or expell said heirs from the State, and how and when they first came to a knowledge of the matters alleged in the bill, how the courts were captured and closed their doors against said heirs. The truth of the matter alleged therein is admitted on demurrer, if that is long enough to reach the amended bill. In terms it only goes to the orig-
280 inal except by implication. Their pleadings are notoriously defective from habit. To give effect requires great indulgence by the court and counsel from an idea that "brevity is wit," which thoughtless attorneys and certain judges have passed into a maxim.

The defense furnish the evidence of having living witnesses to show the circumstances under which the Beebe patents were made as clearly as they ever could, even if lost it could not be to excuse transactions so evidently fraudulent. The injured parties are not held to keep their evidence alive. Besides the sixteen living witnesses presented before the Department of Justice in said brief they refer to W. E. Woodruff on four different occasions introduced as follows: "Mr. Woodruff shows he is not interested (when in fact he administered Philbrook estate and never accounted); and he
281 is upon the ground all the time, having the best kind of an opportunity to know."

Now, on cross-examination will appear all charged to him in the said amended bill, and asked to be taken as repeated here as part of this reply.

That this is instituted by the United States for its sole benefit and not for the benefit of any person or persons to cause the said fraudulent patents to be vacated, delivered up to the United States, and cancelled.

That no lapse of time runs against the United States and *it* is not barred from having and maintaining her said action, and this the said plaintiff is ready to verify.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Solicitors for Plaintiff.

I, Liberty Bartlett, an attorney herein, say that the foregoing plea is not interposed for delay, and that it is true in point of
282 fact.

LIBERTY BARTLETT.

Sworn to and subscribed before me this 3rd day of December, 1883.
RALPH L. GOODRICH, *Clerk, &c.*,
By W. P. FEILD, *D. C.*

I certify that, in my opinion, the above is well founded in law.
LIBERTY BARTLETT, *Sol.*

Endorsed: Filed December 3, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

Which motion to set demurrer and pleas down for hearing is as follows to wit:

In the U. S. Circuit Court, Eastern District of Arkansas.

UNITED STATES *v.* CHAS. W. BEEBE *et al.*

Complaint in equity.

283 Comes the said plaintiff and moves the court to set down for a hearing at the next rule day succeeding the filing hereof the demurrer of J. W. Martin and wife, heretofore filed, to the amended bill of complaint herein.

Also the plea of W. C. Ratcliffe, as administrator of the estate of Cora F. Faust, heretofore filed, asking an order dismissing the cause for want of parties defendant therein.

And because the same is not prosecuted by the Attorney General, and because the cause of action is stale, and that it is barred by the statute of limitations.

And the plaintiff asks that the replication filed herein on defendants' several pleas on the statute of limitations be taken and considered as a replication to said motions asking the suit dismissed because it is pleaded as stale.

CUMMINGS & BAKER,
LIBERTY BARTLETT,
Solicitors for Plaintiff.

Endorsed: Filed December 3, 1883. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

284 And on April 18, 1884, as follows:

285 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in for the eastern district of Arkansas, begun and holden on Monday, the 14th day of April, anno Domini one thousand eight

hundred and eighty-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable David J. Brewer, circuit judge, 8th judicial circuit, presiding and holding said court, the following proceedings were had, to wit, on April 18, 1884.

UNITED STATES *v* CHARLES W. BEEBE *et al.*

Now, on this day, comes said plaintiff, by Liberty Bartlett and Cummings and Baker, her solicitors, and also come said defendants, by U. M. & G. B. Rose, J. M. Moore and Clark & Williams, their solicitors, and the court, having heard argument on the demurrer to the amended bill herein and being now sufficiently advised in the premises, is of the opinion that said demurrer should be sustained.

286 It is therefore ordered, considered, and decreed that said demurrer be sustained, and that said bill and amendment be, and the same are, dismissed for the want of equity; and the plaintiff prayed an appeal to the Supreme Court of the United States, which is granted.

During the submission, argument, and ruling on said demurrer his honor, the district judge, did not sit.

287 *Affidavit of Henry C. Caldwell.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 3, 1884.

I, J. D. Smith, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of a deposition made by Henry C. Caldwell, under date of September 7th, 1877, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. D. SMITH,
Acting Commissioner of General Land Office.

288 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Henry C. Caldwell, being duly sworn, deposes and says: I have resided in the city of Little Rock, Arkansas, continuously since the year A. D. 1863. In 1867 I purchased a half block in said city and the improvements thereon for use as a permanent home. Before making said purchase I employed one of the leading lawyers of said city, who had resided therein for many years, and who was familiar with the history of land titles in said city and the public records relating thereto, to examine the public records relating to the titles to lands in said city and furnish me with a written abstract of the title to said half block, together with his written opinion as to the validity & sufficiency of the
289 title of the then owner. My attorney searched the records & prepared therefrom a written abstract of the title to said

half block. Said abstract of title showed that the eighty acres of which said half block was a part had been patented by the United States to Ashley & Beebe, and that afterwards by a decree of a court of competent jurisdiction it was adjudged that one Matthew Cunningham or his heirs, by virtue of a pre-emption right older in point of time than the location & patent of said Ashley & Beebe, had in equity the better right to said tract, and said patentees were accordingly required to convey the legal title to said tract acquired by virtue of the patent issued to them to said Cunningham or his heirs, and that by virtue of said patent and said decree the
290 absolute title in fee simple to said tract was vested in said Cunningham & his heirs. My attorney gave his opinion in writing that the then owner of said half block, having a proper conveyance therefor from the heirs of said Cunningham, to whom the same was assigned in a proper proceeding to partition said tract, was invested with an absolute and feasible title in fee simple to said half block; and upon the faith of said abstract & said opinion I purchased said half block in good faith, paying therefor its full value, & have continued to reside thereon & improve the same ever since.

Said half block is within the limits of the so-called "Philbrook claim."

I state distinctly that I never saw the name of Philbrook on the records or papers examined & consulted in making my said
291 purchase, and I never heard of said Philbrook or the title or claim now set up by him or his representatives to a large portion of said city until a year or two ago.

I was at unusual pains to ascertain with the utmost degree of certainty that my title to said half block, if I purchased the same, would be perfect, & in addition to the written abstract of title & the written opinion of my attorney as to said title I inquired of the oldest lawyers in the city & others familiar with the history & the titles to the land on which it is situated, and was assured by all that the written abstract stated the title truly & accurately, & that if I obtained the Cunningham title I would have a perfect title in law & equity.

HENRY C. CALDWELL.

292 Subscribed & sworn to before me this 7th day of September, 1877.

[SEAL.] RALPH L. GOODRICH,
Clerk U. S. Cir. Ct., E. D. A..

293 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals remaining of record in my office, but said transcript does not contain the following papers, which are on file and a part of the record in said cause,

the same having been omitted by direction of the solicitor for the plaintiff, namely:

City directory attached to defendant's plea for additional parties.

Deposition of Wm. E. Woodruff, filed by defendant.

Motion for *dedimus potestatem* for above deposition, filed by defendant.

Opinion of Geo. W. McCrary, circuit judge, on demurrer to bill.

Brief of defendant, by U. M. Rose.

Exhibit B to Exhibit B^{10}, inclusive, to original bill filed by plaintiff.

Exhibit C to Exhibit C^{3}, inclusive, to original bill filed by plaintiff.

294 Exhibit D to Exhibit D^{2}, inclusive, to original bill filed by plaintiff.

Exhibit E, Philbrook's will, to original bill.

Exhibit H to original bill filed by plaintiff.

Exhibit I to Exhibit I^{3}, inclusive, filed by plaintiff.

Exhibit C^{4} to Exhibit C^{6} to amended bill filed by the plaintiff.

Exhibit C^{9} to amended bill filed by plaintiff.

Motion for process to serve on non-resident defendants, filed by plaintiff.

Motion for leave to amend bill and time set, filed by plaintiff.

Motion to amend the record, filed by plaintiff.

Motion to retain defendant's papers on file, filed by plaintiff.

Brief for plaintiff and exhibit, filed May 10, 1883.

Brief for plaintiff, filed May 31, 1883.

Brief for plaintiff, filed May 21, 1883.

Writs in the cause.

In witness whereof I have hereunto set my hand and the seal of said court this 7th day of November, in the year of our 295 Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth.

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

Attest: RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 180. The United States, appellant, *vs.* Charles W. Beebe *et al.* Filed 10th November, 1884.

127-338
127-338

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 180.

In the Case Whereof The UNITED STATES are Plaintiffs

vs.

CHARLES W. BEEBE *et al.*, Defendants.

Affidavit of Liberty Bartlett, the Attorney of Record for the United States,

In answer to U. M. Rose and S. W. Williams, solicitors for the defendants, on a motion to dismiss the appeal for an alleged defective transcript, and affidavits in support of the same.

Explanatory.

By mistake or design the local attorney, Bartlett, was not served with a copy of the said motion and affidavits till December 23, 1887, the same made October 14, 1887; hence the delay in the answer; then it came from my associates at Washington, D. C. If possessed of a fair degree of courtesy the defendants' solicitors would have served a copy at the time of filing.

Affidavit.

I, Liberty Bartlett, the local solicitor for the plaintiffs in

above-entitled cause, being duly sworn, state that heretofore, to wit, on the 5th day of November, 1887, I made an affidavit, in which, with others, appears the following paragraph:

"The work on the transcript was open to the inspection of U. M. Rose and son, the former chief attorney out of twelve, or nearly so, for the defense, and before closing I called at their office and informed them that it was still open if they desired to add further record, but none was offered."

In reply to this U. M. Rose makes an affidavit, on the 17th day of November, in which he states as follows:

"I was of counsel for the defense in this case in the court below at that time, and ever since my law firm has been composed of myself and my son, G. B. Rose. I am as certain as I can be of anything in my past experience that Liberty Bartlett never spoke to me or conferred with me in any way about the transcript in this case at any time."

Subscribed and sworn to, &c.

Then follows the affidavit of his son, G. B. Rose, in nearly the same words; so nearly alike that I need not repeat it here.

In answer, I assert that I nowhere say that I had a consultation with U. M. Rose about the transcript, for no opportunity was given to consult, and his affidavit on that point is entirely gratuitous. This case was an exception to a general rule in this court—that is, for attorneys to appear and agree on the make-up of the transcript, and here it was held open several days for such an arrangement; meantime U. M. Rose appeared and made a record that I construed into an approval of the transcript as it is.

The time here spoken of was about the first of November, 1884, when the deputy clerk had the transcript nearly written up. I had not met with U. M. Rose since his return from a three-month trip to Europe, and I did not believe that he desired the charging paragraph in Judge McCrary's opinion or his brief on file—the cause of it—to appear in the transcript; and, out of kindly motives, I took the opinion over

to Judge Rose's office to inquire what were his wishes as to the opinion and his brief being copied. Judge Rose was not in, and what reminds me more certain of what occurred I returned a law book that I had out a long time. While explaining this and some general talk a stranger to me came in, when I said to young George B. Rose in effect: "Tell the Judge to call over and examine the transcript about being closed." I returned to the clerk's office and informed W. P. Field, deputy clerk, having the work in charge, of the notice given, and we agreed to hold open two or three days for the use of Judge Rose.

I had reason to believe that George B. Rose (who never appeared in the case, and our acquaintance was but slight) did inform U. M. Rose as requested, for he put in the files an extra printed clerk's certificate, the blanks filled in bearing date November 5, 1884, signed Ralph L. Goodrich, clerk, appearing as a copy for the clerk to follow, and did so certify on the seventh—two days later—the same in exact terms attached to the transcript. On the left-hand margin of said certificate U. M. Rose wrote: "*The clerk will follow this copy.* (Signed) *U. M. Rose.*" Then, with a mark to designate the place, he writes in the body to copy, "with exception of the following papers, which are on file and a part of the record in said cause, the same having been omitted by *direction of the solicitor for the plaintiffs*, namely"—meaning myself, the only local solicitor for the plaintiffs. U. M. Rose could not truthfully say that without having conferred with me. See his affidavit just now copied, saying "that Liberty Bartlett never spoke to me or conferred with me in any way about the transcript in this case at any time." This leaves U. M. Rose with the said omitted papers in his hands, and he directs the clerk (Goodrich) how to certify them up, which he does do in exact terms (though not true), as appears on page 87 of printed transcript; and the second day thereafter, November 7, 1884, the certificate was made, with evident marks of approval, as it is, on the only proper time to offer additions, if any desired.

The chief clerk, Ralph L. Goodrich, made an affidavit in support of the defendants' motion to dismiss, saying "that at the request of the solicitor of the plaintiffs I omitted from said transcript the following papers and records which are on file in said cause" (then he names the several papers), which is not true. See U. M. Rose, just now quoted: "The clerk will follow this copy." Then he copies from U. M. Rose what he attributes to myself.

Clerk Goodrich was gone North on his summer vacation till a few days before the transcript was written up by the deputy clerk, W. P. Field, with whom alone I conferred. Goodrich was in attendance on the court, and we never conferred in regard to the transcript. He has required and attached to his own an affidavit by W. P. Field, deputy clerk, to this effect. To be certain that I was correct I submitted my former affidavit to W. P. Field, deputy clerk, who read it carefully, and when I saw the transcript was certified by the deputy clerk, Field, he said that was so, for it was a rule that whichever did the work made the certificate, and it was entirely his own. Hence the innocent mistake—harmless. So when I state of calling at Judge Rose's office he remembered my report of notice given, for we agreed to keep the case open two or three days for Judge Rose.

But the records and papers referred to will show that they were properly omitted—not one of them referred to at the hearing on the demurrers. They "enumerate" but one paper in their joint affidavit—that is the "City Directory filed." Being sworn to, calls for the facts being stated. It was simply filed four years since, and remained in sound sleep, containing over five thousand names. What a record—five thousand names! How would the court be enlightened on "stale claim?" It would read like "Webster's Unabridged." They state under oath "it is the defendants' plea for additional parties, who are indispensable to a proper understanding of the cause on the present appeal." Evidently, depending on these 5,000 names, they have no defense; it

proves too much. They neglect to state this. Refer to page 38, printed transcript, showing the Cockerham claim for 640 acres was withdrawn before the trial, leaving in suit 480 acres, thus disposing of nearly two-thirds of the "City Directory" with no bearing on "stale claim."

The next paper "omitted" is W. E. Woodruff's deposition, taken February 4, 1884, nearly a year after the trial, before Judge McCrary, the witness over eighty years of age, taken by the defendants for use at the trial on the merits, remaining a sealed book, only opened by order of court, well known to affiants.

Further on the joint affidavit: "We never at any time consented to the omission from the transcript of the papers enumerated in said affidavit." Did not? They forget U. M. Rose, who said, "The clerk will follow the copy," which included the three pretended "indispensable" exhibits omitted, marked "B," "C," and "D," some twenty-five copies of proceedings had in the several departments at Washington, D. C., and were not before the court or referred to at the trial. The only record made by the defendants and preserved was in U. M. Rose's printed brief of 152 pages, and in that I find no reference to the said exhibits. He refers to a record made in the Little Rock Land Office, but he did not offer that to be copied in the transcript. Had he done so, or offered any other proper record, it would have been copied. U. M. Rose directed the clerk to certify them up as "omitted papers," calling them by name, and so held for three years without objection.

The remaining exhibits filed by the plaintiffs were deemed of no importance, but were on file and had to be mentioned, though not referred to on the trial or in the briefs.

The several motions referred to filed by the plaintiff were not acted upon, as well his printed brief of 113 pages was not sent to the court in Iowa.

Here the entire list of omitted papers are accounted for, no one objecting. If U. M. Rose "did not consent to their

omission" he directed the clerk to certify the same and stood on that record approved for three years—evidently concerted action.

As to the opinion of Judge McCrary, on file. On the first of November, 1884, all the twenty-five papers enumerated in the application had been copied into the transcript and the written opinion of the circuit judge was being considered. The authorities examined seemed to say that the opinion of the judge should not be copied into the record, and there were special reasons why this opinion should not go into the transcript. One had reference to the conduct and printed brief (152 pages) of Solicitor U. M. Rose, nearly half of which was devoted to the abuse and traducing of Attorney General Brewster, the chief executive officer of this court. The same referred to severely in said opinion by Judge McCrary as follows in the closing paragraph:

"The court, however, deems it proper to say, in view of some remarks by counsel for the respondents, that, in its opinion, the official action of the Attorney General in directing that the bill be filed cannot properly be made the subject of adverse criticism. The bill was filed upon the recommendation of the Secretary of the Interior for the declared purpose of having the questions which were being pressed upon the attention of the Land Department in connection with the claims of the Philbrook heirs determined by the judicial department of the Government. These questions are important and unsettled. An appeal to the courts was therefore entirely proper."

To show and justify a desire on my part to confer with Judge Rose as to inserting a copy of said opinion and his brief for reason "on file," which was and now is being claimed, I deem it proper to extract to show its purport.

On the first appearance of U. M. Rose's brief he called me and said he had sent a copy to Attorney General Brewster by express, requiring a return receipt as proof that it was delivered into his hands. I was advised by my associates

at Washington, D. C. (Cummings & Baker), that Attorney General Brewster took the said brief as a personal insult and appealed to one or more of the supreme justices for redress; and the justices of that district would meet our circuit judge at Keokuk, Iowa, and would see that the Attorney General was set right. Hence the rebuke given in that opinion and an inducement to withhold a copy from the transcript as a kindly act to Judge Rose.

Extracts from U. M. Rose's Brief.

From printed page 32:

"If the Attorney General is in any way responsible for what is stated in the bill which he has vicariously caused to be signed with his name without ever seeing it or knowing what was in it, then *he is confessedly guilty of two or three distinct common-law offenses punishable by indictment.*"

On page 33 U. M. Rose alleges that "Blackstone says that maintenance is an officious intermeddling in a suit that in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend. Champerty is a species of maintenance and punished in the same manner. * * *

"Common barratry is the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise. * * * It is enacted by statute (12 George, 1 c., 29) that if any one who has been convicted of forgery, perjury, or common barratry shall practice as attorney, solicitor, or agent * * * shall be transported for seven years—*all of which the Attorney General has actually done.*"

In this connection I will extract from a motion to strike said brief from the files, given in full on page 39 of the printed transcript:

For cause. First. The said brief is impertinent, libelous, and insulting to the plaintiffs and attorneys.

Second. It is grossly abusive to the court and to the Attorney General while in the performance of his official duty.

Third. It is false in adding three names, pretended parties plaintiff, and as such held throughout their printed brief.

Wherefore it is moved that said brief be stricken from the files.

Endorsed: "Filed June 18, 1883. R. L. Goodrich, clerk."

On page 37 of the printed transcript:

"April 19, 1884, that this case is argued and submitted to the court on the demurrer to the bill, and ordered that the defendant's, U. M. Rose's, brief be filed forthwith, and that the plaintiffs' brief be filed on or before the tenth of May."

Whereupon Judge McCrary left for his home at Keokuk, Iowa, and never returned to hold court. The said opinion, if such it may be called, had a singular origin and record made, for which its insertion is questioned.

From page 38:

"In obedience to an order of court May 10, 1884, the plaintiff, by its solicitor, Bartlett, files a brief (of 71 printed pages) incomplete, the balance in the hands of the printer, and moves the court to extend the time of filing to the 20th of May."

Same page:

"The plaintiff moves to dismiss without prejudice the land (640 acres) in the Cockerham certificate, No. 156."

Endorsed: "Filed May 21, 1883. R. L. Goodrich, clerk."

From information, Judge McCrary remained at Keokuk, Iowa, and my motions and two briefs remained in the clerk's office without a hearing by the court, except a twelve-page brief by Solicitors Cummings & Baker, selected and sent

forward; but why not all the record was never explained. The brief filed May 10 by order of court, but withheld, was largely in defense of Attorney General Brewster against the assaults made in U. M. Rose's brief; and in reply to "stale claim," that the Philbrook heirs were prevented by violence from asserting their rights in the Arkansas courts, I refer to the first twenty pages of the transcript, showing how the United States, the Attorney General, and the Philbrook heirs were thrown out of court, and so held two months by the clerk, Ralph L. Goodrich. What of Philbrook heirs alone and stale claim?

The last record made was on June 18, 1883, which was on the aforesaid motion to strike U. M. Rose's brief from the files, when, after twelve or fifteen days looking for notice of Judge McCrary's court being convened, I heard it mentioned in W. & W.'s book store that the Philbrook heirs had been hustled out of court again and lost their case. On inquiry at the clerk's office I was surprised to find the following record made on the printed transcript, page 40:

"And on June 30, 1883, the following proceedings were had, to wit: The United States, by her Attorney General, Benjamin H. Brewster, *vs.* Charles H. Beebe *et al.* (sixteen others). Comes the complainants, by Liberty Bartlett and Charles C. Waters, Esqs., their solicitors, and comes the defendants, by U. M. Rose, S. W. Williams, and J. M. Moore, Esqs., their solicitors, and the court, being well and sufficiently advised of the matters arising on the demurrer to the bill of complaint herein, considers that the same be sustained.

"It is further ordered that, upon entering the order sustaining the demurrer to complainants' bill, leave be granted to complainants to amend their bill on or before the first day of next term."

This record does not show that a court was holden by Judge McCrary or any other judge, or at any place defined in the introductory of "Be it remembered," &c., as appears

on page 31 and again on page 85, by Judge Brewer—the same omitted—for no regularly appointed accessible court was convened, and it did not speak truly—"Comes Liberty Bartlett, &c., solicitors." An opinion emanating from such a source was held to be simply an argument on stale claim, and should not be copied into the transcript.

LIBERTY BARTLETT.

Subscribed and sworn to before me this 19th day of January, 1888.

[SEAL.]

N. W. COX,
Notary Public.

v. 338

127 - 338

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1887.

No. 180.

Opinion of Judge McCrary.

Circuit Court, Eastern District of Arkansas.

UNITED STATES *vs.* BEEBEE and Others.

The facts are sufficiently stated in the opinion.

Cummings & Baker and Liberty Bartlett, for complainant; U. M. & G. B. Rose, Clark & Williams, and J. M. Moore, for respondents.

McCRARY, *J.:*

The demurrer raises, for the first time in a Federal court, the important question whether any lapse of time will constitute a bar or a sufficient defense to a suit in equity brought in the name of the United States.

This suit is brought to cancel and set aside certain land patents executed by the United States on the ground that the same were obtained by fraud. The patents attacked as fraudulent were issued about forty-three years before the filing of the bill, and many of the alleged matters of fact, concerning which it would be necessary to take proofs in order to determine the question of fraud, transpired more than sixty years before the filing of the bill, as appears from its allegations. The claims of the Philbrook heirs, which it is alleged were unlawfully and fraudulently set aside by the action of the Land Department, had their inception in November, 1815. The frauds alleged to have been perpetrated by C. W. Beebee and Chester Ashley consisted, as alleged, in inducing the register of the land office to believe that the settlers on the land had consented to the issuance of the patents, and it appears that whatever they did to this end was done prior to October, 1838; both the parties charged to have actually participated in the fraud are long since dead, and we may assume that most, if not all, the witnesses who could testify from personal knowledge concerning it are likewise dead. The city of Little Rock, now the capital of Arkansas, has been built upon the land, and hundreds of innocent purchasers have bought and paid for portions of it upon the faith of the patent of the United States. The land is covered with the homesteads of many hundreds of families. It has been thus occupied in many instances by the present holders and their predecessors for more than a generation. A court of equity cannot contemplate with any degree of favor the proposition that this land shall, at this late day, be declared a part of the public domain or granted to claimants who have so long slept upon their rights. It must, however, be conceded that, as a general rule,

the United States is not bound by any statute of limitations not imposed by Congress, or chargeable with laches.

The following cases, cited by counsel for plaintiff, abundantly support this general doctrine: U. S. *vs.* Kirkpatrick, 9 Wheat., 720; Gibson *vs.* Chouteau, 13 Wall., 92; Gaussen *vs.* U. S., 97 U. S., 584; U. S. *vs.* Thompson, 98 U. S., 486.

These are all, it is true, actions at common law, but the same doctrine must, no doubt, prevail in equity, where the statute of limitations is sought to be interposed, in analogy to a like limitation at law. Unless, therefore, this defense can be supported upon some principle of equity jurisprudence separate and distinct from any State statute of limitations and from any considerations based alone upon the laches of the public agents of the Government, it must fail, however disastrous to the rights of innocent parties and however inequitable the consequences may be.

We are thus brought to the consideration of the question whether a lapse of time so great as to afford a clear presumption that all the witnesses to the transaction in controversy are dead and all proof lost or destroyed will, of itself, constitute a bar to a suit in equity, independently of any statute of limitations and without regard to any question of laches; or, in other words, Should a court of equity refuse to entertain a bill in equity upon the sole ground that the lapse of time has been so great as to make it impossible to ascertain the facts and apply the remedy by reason of the death of the witnesses and the loss or destruction of proofs? In my judgment, the doctrine that a court of equity will not entertain a claim so stale as to be not capable of satisfactory proof must stand as one applicable alike to all suitors; it rests not upon any statute of limitations nor upon any doctrine of laches alone, although the fact of laches may always appear; it rests rather upon the sound rule that no court should ever entertain a controversy after the ravages of time have destroyed the evidence concerning it. A party called upon to answer to a charge of fraud committed by his ancestors or those through or under whom he claims, more than forty years before the commencement of the suit, need not plead the technical bar of the statute of limitations or the laches of the complainant; it is enough if he alleges that the claim is stale and insists that by reason of the long delay in bringing suit the witnesses, by whom he might have explained the transaction, are dead. To compel him to submit his rights to adjudication under such circumstances would be abhorrent to the principles of equity, not because of any statutory bar or any laches merely, but because the great lapse of time is evidence against the complainant and in favor of the defendant, and because it is contrary to equity and good conscience that any person should be brought into court to answer for a fraud alleged to have been committed by others before he was born, and so long ago as to make it impossible for him to find living witnesses who have personal knowledge of the facts. Under such circumstances a court of equity ought to presume that the persons who were cognizant of the facts could, if living, explain them so as to disprove the charge of fraud.

It is well settled that possession of land for a long period of time

will raise a presumption of a grant which will be enforced as against the Government (Mayor *vs.* Horner, Cowp., 102; Jackson *vs.* McCall, 10 Johns., 380; Lewis *vs.* San Antonio, 7 Tex., 304; 3 Starkie, 1221; 2 Whart. Ev., § 1348; Roe *vs.* Ireland, 11 East, 280), and if a grant is to be presumed by reason of the lapse of time, when there is no other evidence of a grant except that afforded by long possession, it would seem that upon similar grounds the validity of a grant which is shown to have been actually executed and under which possession has been held for an equally long period of time should be presumed. The authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and they show that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely: *First*, that courts of equity must, for the peace of society and upon grounds of public policy, discourage stale demands by refusing to entertain them; *second*, that lapse of time will, if long enough, be regarded as evidence against the stale claim equal to that of credible witnesses, and which, being disregarded, would, in a majority of cases, lead to unjust judgments; *third*, that after the witnesses who had personal knowledge of the facts have all passed away it is impossible to ascertain the facts, and courts of equity will on this ground refuse to undertake such a task.

Thus Mr. Justice STORY says:

"A defense peculiar to courts of equity is founded on the mere lapse of time and the staleness of the claim in cases where no statute of limitations directly covers the case. In such cases courts of equity act sometimes by analogy to the law and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere when there has been gross laches in prosecuting rights or long and unreasonable acquiescence in the assertion of adverse rights." (2 Story, Eq., 1520.)

And in Maxwell *vs.* Kennedy (8 How., 221) the Supreme Court of the United States, in answer to the argument that there was no statute of limitations applicable to the case at bar, said:

"We think the lapse of time, upon the facts stated in the bill and exhibits, is, upon principles of equity, a bar to the relief prayed without reference to the direct bar of a statute of limitations."

Again, in Clarke *vs.* Boorman (18 Wall., 509) the same Court said:

"Every principle of justice and fair dealing, of the security of rights long recognized, of repose of society, and the intelligent administration of justice, forbids us to enter upon an inquiry into that transaction 40 years after it occurred, when all the parties interested had lived and died without complaining of it, upon the suggestion of a construction of a will different from that held by the parties concerned and acquiesced in by them throughout all this time."

In Brown *vs.* Co. of Buena Vista (95 U. S., 161) the same doctrine is expressed in these words:

"The lapse of time carries with it the memory and life of wit-

nesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

In Harwood *vs.* Railroad Co. (17 Wall., 78) the doctrine is concisely and clearly stated thus:

"Without referring to any statute of limitations the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case."

In Badger *vs.* Badger (2 Wall., 94) the Court said:

"But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim where no statute of limitations covers the case. In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights."

In Boone *vs.* Childs (10 Pet., 248) the rule is thus laid down:

"A court of chancery is said to act on its own rules in regard to stale demands and independent of the statute; it will refuse to give relief where a party has long slept on his rights and where the possession of the property claimed has been held in good faith without disturbance and has greatly increased in value."

In Wilson *vs.* Anthony (19 Arkansas), cited with approval by the Supreme Court of the United States in Sullivan *vs.* Railroad Co. (94 U. S., 811), the doctrine is well stated thus:

"The chancellor refuses to interfere, after an unreasonable lapse of time, from considerations of public policy and from the difficulty of doing entire justice, when the original transactions have become obscured by time and the evidence may be lost."

And see Elmendorf *vs.* Taylor, 10 Wheat., 173; Hume *vs.* Beale's Ex'r, 17 Wall., 343; Hall *vs.* Law, 102 U. S., 465; Godden *vs.* Kimmell, 99 U. S., 210.

Numerous other authorities might be cited to the same effect, but these are sufficient. In view of these authorities and upon reason I hold it to be a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations and without necessary reference to any question of laches. Such being the law, it is clear that lapse of time may be a sufficient defense to a suit instituted in the name of the Government.

It is well settled that when the United States becomes a party to a suit in the courts and voluntarily submits its rights to judicial determination it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice it at the same time voluntarily submits to the law and places itself upon an equality with other litigants. (U. S. *vs.* Fossatt, 21 How., 450; The Floyd Acceptances, 11 Wall., 675; U. S. *vs.* Barker, 12 Wheat., 559–561.)

In Mitchel *vs.* U. S. (9 Pet. 557) the Court said:

"By common law the king has no right of entry on land which is not given to his subjects; the king is put to his inquest of office

or information of intrusion in all cases where a subject is put to his action. Their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to land he cannot acquire it without office found, so as to annex it to his domain."

And see U. S. *vs.* State Bank, 96 U. S., 36; U. S. *vs.* Bostwick, 94 U. S., 66.

"The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party." (U. S. *vs.* Smith, 94 U. S., 217.)

In the case of The Siren (7 Wall., 159) the Court said:

"But, although direct suits cannot be maintained against the United States or against their property, yet when the United States institute a suit they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed; and when they proceed *in rem* they open to consideration all claims and equities in regard to the property libeled."

And in the same case it was said that the Government, by its appearance in court, "waives its exemptions and submits to the application of the same principles by which justice is administered between private suitors."

See, also, Burbank *vs.* Fay, 65 N. Y., 62; Osborne *vs.* Bank, 9 Wheat., 870; U. S. *vs.* Macdaniel, 7 Pet., 1; Brent *vs.* Bank of Washington, 10 Pet., 615. In the latter case the Court declares that there is no reason why the United States should be exempted from a fundamental rule of equity, subject to which its courts administer their remedy, and it is said: "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking, in the administration of the law of equity, relief," etc.

The same doctrine was laid down in strong language by Attorney General Black in Reside's Case (9 Op. Att'y Gen., 204), and also in the case of People *vs.* Clarke, (10 Barb., 120). In the latter case, which was a bill instituted by the attorney general of New York to cancel certain patents granted before the Revolution, the Court said:

"If the questions in this case may be deemed to belong to a court of equity, I cannot persuade myself that they are, therefore, never to be put at rest by lapse of time. It would be an alarming doctrine to hold that every man in the State who holds any land under a grant before the Revolution may be turned out of possession by the plaintiffs, if a king was cheated who, one or two hundred years since, made the grant."

See, also, upon this point, Mayor of Hull *vs.* Horner, Cowp., 110, decided by Lord Mansfield.

These considerations lead to the conclusions, *first*, that the lapse of time constitutes a good defense to this suit, upon the general principles of equity above stated, and which would be administered as between two citizens litigating in this tribunal; and, *second*, that the United States is bound by the same law.

These conclusions render it unnecessary to consider the other important questions discussed by counsel.

The court, however, deems it proper to say, in view of some remarks of the counsel for respondents, that, in its opinion, the official action of the Attorney General in directing that the bill be filed cannot properly be made the subject of adverse criticism. The bill was filed upon the recommendation of the Secretary of the Interior, for the declared purpose of having the questions, which were being pressed upon the attention of the Land Department in connection with the claims of the Philbrook heirs, determined by the judicial department of the Government. Those questions are important and unsettled. An appeal to the courts was, therefore, entirely proper.

The demurrer to the bill is sustained; and, unless the complainant asks leave to amend, there will be a decree for respondents dismissing the bill.

Caldwell, J., being interested, took no part in this case.

24-338
127-338

WRIT OF CERTIORARI AND RETURN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

vs.

CHARLES W. BEEBE ET AL.

INDEX.

	Original.	Print.
Exhibits I, I¹, I², &c., to Bill—Certificate of Commissioner of General Land Office	1	1
Bond of Roswell Beebe, July 6, 1838	1	1
Petition for survey of 640 acres, Oct. 6, 1820	12	4
Letter of Register and Receiver of Little Rock to Commissioner of General Land Office, Jan. 30, 1839	14	5
Letter of Register and Receiver of Little Rock to Commissioner of General Land Office, Jan. 30, 1839	19	7
Bond of Roswell Beebe, July 6, 1838	21	8
Letter of Commissioner of General Land Office to King & Wilson, May 25, 1839	27	11
Letter of P. T. Crutchfield to Commissioner of General Land Office, July 15, 1839	29	11
Petition to Congress by citizens of Little Rock	33	13
Letter of Roswell Beebe to Commissioner of General Land Office, Aug. 28, 1839	39	15
Letter of Commissioner of General Land Office to Secretary of Treasury Sept. 18, 1839	45	17
Letter of Secretary of Treasury to Commissioner of General Land Office, Sept. 24, 1839	49	18
Writ of certiorari	50	19
Return to writ	51	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY, 30 1888.

1 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June* 3, 1878.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed, from pages 1 to 16, inclusive, are true and literal exemplifications from the files of this office of the bond signed by Roswell Beebee July 6, 1838; petition for survey of 640 acres, dated Oct. 30, 1820, and also from a copy of a letter to the Commissioner of the General Land Office from the register and receiver at Little Rock, Arkansas, dated January 30, 1839.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] (Signed) J. A. WILLIAMSON,
Commissioner of the General Land Office.

Copy.

This instrument of writing, made the sixth day of July, 1838, by and between Roswell Beebee, of the city of Little Rock, in the
2 State of Arkansas, of the one part, and the mayor and aldermen of said city of Little Rock, in behalf of said city, as well as on behalf of the said State of Arkansas, and also in behalf of any person or persons who may have in his own right a proper and regular chain of conveyance or conveyances of any town lot or lots situate in the first original town, now city, of Little Rock derived from, by, or under any one or more of the original owners and proprietors of the said town as aforesaid and as represented upon the first original plan, as then surveyed and laid off into town lots, of the other part, witnesseth:

That whereas the said Roswell Beebee has caused to be located and entered with pre-emption floating claims at the land office at Little Rock, and upon which the city as aforesaid (west of the Quapaw line) is now built, the following-described tracts or parcels of land, to wit, the northeast fractional quarter of fractional section three (south of Arkansas river) and the west fractional parts of the northwest and southwest fractional quarters of fractional section two (south of Arkansas river and west of the Quapaw line),
3 all in township one north of the base line of range twelve west of the fifth principal meridian; and whereas the original town of Little Rock as aforesaid (west of the Quapaw line), now composing a part of said city as aforesaid, is embraced and included within the tracts of land which the said Roswell has caused to be located and entered as aforesaid; and whereas the said Roswell is willing and desirous, should patents hereafter be granted and issued to him and his heirs by the United States for said several tracts of land by virtue of the locations and entries as aforesaid, and which now embraces a part of the said original town as aforesaid, now a part of the said city, to convey by quitclaim deed or deeds only to said mayor and aldermen, in behalf of said city and to said State and to any person or persons, his, her, or their heirs, all and every the right title, interest, claim, and demand which the said Roswell

may acquire in and to the said tracts of land by reason of the locations and issuing of the patents as aforesaid to any lot or lots in said city to which they or either of them or their heirs or either
4 of them may claim by a proper, regular chain of conveyance or conveyances derived from, by, or under some one or more of the said original owners and proprietors of the said original town (west of the Quapaw line), now a part of said city, as aforesaid: Now, therefore,

Know all men by these presents that the said Roswell, in consideration of the premises and also in consideration of one dollar to him in hand paid by the said mayor and aldermen of said city of Little Rock, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth hereby, for himself, his heirs, executors, and administrators, promise, covenant, and agree that in the final issuance of the patents by virtue of the said locations and entries which embrace said original town as aforesaid, he, the said Roswell, his heirs, executors, and administrators, will, at the reasonable demand of the said mayor and aldermen of said city or of the State of Arkansas or of any person or persons, his, her, or their heirs, who may claim any lot or lots in the said city as
5 aforesaid, by virtue of a proper, regular chain of conveyance derived from, by, or under some one or more of the said original proprietors as aforesaid, execute or cause to be executed unto the said mayor and aldermen, in behalf of said city, and to their successors in office, and unto the State of Arkansas and unto any person or persons or his, her, or their heirs, as aforesaid, a quitclaim deed or deeds of relinquishment, thereby assigning, transferring, — setting over all — every the right, title, interest, claim, and demand whatsoever which the said Roswell may, might, or shall have acquired to each and every lot or lots so assigned and set over by reason and means of the locations and entries and the issuing of the patents as aforesaid, & also with the explicit understanding that when the said deeds are so made there shall not be had any other or further recourse to or from said Roswell whatsoever; and such a relinquishment of dower to the premises so assigned as may have been acquired only by the means aforesaid shall be made, provided
6 said deed or deeds shall be demanded, as aforesaid, within a reasonable time after the issuance of the said patents as aforesaid; and the whole charges and expenses of making the same shall be wholly paid by the grantee or grantees therein named or by some one representing him, her, or them; and provided further that previous to the execution by said Roswell or his heirs, executors, or administrators of any such deed or deeds as aforesaid the grantee or grantees, to be therein named, shall and will produce to the said Roswell, his heirs, executors or administrators, the proper and regular claim of such grantee or grantees to the town lot or lots which may be demanded to be quitclaimed and relinquished by said Roswell, his heirs, executors, or administrators, as aforesaid, showing thereby that said grantee or grantees claim the same by virtue of a proper, regular chain of conveyance or conveyances for such town lot or lots and derived also from, by, or under some

one or more of the said original owners and proprietors of
7 said town, as aforesaid, provided always, nevertheless, and
these presents further witness, that whereas there may be adverse or conflicting claims presented to said Roswell and deeds of relinquishment demanded therefor—

Therefore it is furthermore fully and distinctly understood that the said Roswell, his heirs, executors, and administrators, shall have, and do by these presents reserve, the full, absolute, and entire right and power to execute or cause to be executed any and all the said deeds of relinquishment which may be demanded of him or them or either of them as aforesaid either to the holder or claimant of any lot or lots derived or claimed by bond or conveyance made by or derived from, by, or under Chester Ashley or to any of the original owners and proprietors of said town, or he may make the same unto the said Ashley, his heirs and assigns, for any and all lots which may have been conveyed to him by deed, bond, or otherwise, anything herein contained to the contrary thereof in anywise
8 notwithstanding, provided the claimant or claimants of said
lot or lots so demanded be relinquished, claim the same by bond or conveyance from, by, or under said Ashley, or he may make the same to any one or more of the said original proprietors of said original town as aforesaid, provide- the proper claimant or claimants of said lot or lots so demanded be relinquished, claim the same by bond or conveyance made by or derived from, by, or under any one or more of said original owners and proprietors to whom said deed or deeds may be made as aforesaid: And provided also, That the said Roswell shall not be obligated or bound by anything herein contained to make any one or more deeds as aforesaid to any of the said original owners and proprietors as aforesaid or to their heirs or to any claimant or claimants whatsoever whose original conveyance or conveyances were not acquired by him, her, or them or some one or more prior claimant or claimants from, by, or under some one or more of the said original owners
9 and proprietors of said original town as aforesaid prior to
these presents; and, moreover, in order to prevent as far as possible all further disputes which might arise from the existence of any one or more adverse or conflicting claims to any of said lots, therefore the said Roswell shall not by these presents be obliged in making deeds as aforesaid to consider a younger claim at the expense of an older one, wherein the rights upon the face of the original and subsequent conveyances are equal, and whenever a deed has been once made as aforesaid for any of the said lots no subsequent demand made by any other claimant therefor shall be entitled to any consideration whatever. And, furthermore, nothing herein contained shall ever be so understood, either as expressed or implied, that can or shall make the said Roswell in anywise responsible or liable for any claim or title or for any defect therein. And, lastly, a refusal on the part of the United States to issue the
10 patents as aforesaid shall from thenceforth and forever there-
after make these presents and every matter and thing therein contained utterly null and void.

In witness whereof the said Roswell Beebee has hereunto set his hand and seal the day and year first above written.

ROSWELL BEEBEE. [SEAL.]

Signed, sealed, and delivered in presence of us—
JOHN HUTT.
ANTHONY CREASE.

STATE OF ARKANSAS, } ss:
County of Pulaski, }

Be it remembered that on the sixth day of July, 1838, personally appeared before me, John Hutt, a justice of the peace in and for the county and State aforesaid, the hereinbefore-named Roswell Beebee, to me personally known, and acknowledged the foregoing instrument of writing as for his act and deed for the uses and purposes therein contained and expressed.

In testimony whereof I have hereunto set my hand as a justice of the peace the day and year last aforesaid.

(Signed) JOHN HUTT, *J. P.*

11 STATE OF ARKANSAS, } ss:
County of Pulaski, }

I, Lemuel R. Lincoln, clerk of the circuit court and *ex officio* recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the first day of September, A. D. 1838, and the same is now duly recorded in Record Book K, pages 68, &c.

In testimony whereof I have hereunto set my hand *at* affixed the seal of my office, at Little Rock, the 3rd day of September, in the year of our Lord one thousand eight hundred and 38, and of the Independence of the United States the 63rd year.

[L. S.] SAMUEL R. LINCOLN,
Clerk and ex Officio Recorder.

G. L. O.
Received in letter of R. & R., dated 30th January, 1839.

12 To the surveyor of the lands of the United States for the States (late Territories) of Illinois and Missouri and the Territory of Arkansas.

SIR: Please to take notice by virtue of a certificate issued by Frederick Bates, Esq., recorder of land titles for the Territory of Missouri, pursuant to an act of the Congress of the United States passed on the 17th February, 1815, relative to lands injured by earthquakes, which said certificate is dated on the 13th day of November, 1815, is numbered one hundred and fifty-six (156), and entitles Henry Cockerham or his legal representatives to locate any quantity of land, not exceeding six hundred and forty acres, of any of the public land of the (then) Territory of Missouri the sale of which is authorized by law, the undersigned, as the legal representative of the said Henry Cockerham, hereby locates the said quantity of six hundred

and forty acres of land on the south side of the Arkansas river, near the Little Rock, so called, to include all that part of the north half of section numbered ten (10), in township No. one north,
13 of range No. twelve west, of the 5th principal meridian, which is not included in a former location made James C. Canfield as the legal representative of Francis Lessieur; also all that part of the west half of fractional section numbered three (3), in the township and range aforesaid, which is not included in a former location made by Peter Parrier or by Stephen H. Ling, as his legal representative; also the southwest fractional quarter of fractional section numbered (34) thirty-four, in township No. 2 north, of said range No. 12 west; also so much of the east end of the south fractional half of fractional section numbered (33) thirty-three, in the township and range last aforesaid, as will make the said quantity of six hundred and forty acres. An order of survey is accordingly prayed for.

St. Louis, October 30th, 1820.

SURVEYOR'S OFFICE, LITTLE ROCK, *4th May*, 1839.

I certify that the foregoing is a true copy of the original letter on file in this office, signed by Wm. M. O'Hara and dated 30th October, 1820.

DAVID FULTON,
Sur. Pub. Lands.

14 LAND OFFICE, LITTLE ROCK, *January 30th*, 1839.

SIR: Your letter of the 26th ultimo has been received requiring us to report the reasons "why entries No. 3549, 3550, 3552, & 3554 were permitted to be made on land already occupied by prior claims, long since located, and against the validity of which this (your) office possesses no evidence." In reply we have to state that these entries were permitted in conjunction with No. 3556 upon the demand of Roswell Beebee and the several allegations made by him, setting forth and showing conclusively that the Treasury Department had disallowed the pre-emption claims granted under the act of 1814 upon all lands south of the Arkansas river ceded by the Quapaw treaties of 1818 & 1824, including the pre-emption at this place, upon the ground that the Indian title to these lands had not been extinguished at the passage of that law, and that the validity of these locations depended upon the same principle and would no doubt be governed by the same rule of decision, and at which time no one here or elsewhere, so far as we have knowledge, had
15 ever set up any claim to these lands, excepting persons desiring conveyances from those who had supposed they rightfully held from the United States under the pre-emption act of 1814 and the New Madrid location. The original plat of survey embracing these entries was at the time complete and represented the subdivisional lines and the number of acres corresponding, respectively, with those certificates of entry, and there was no evidence of proper record on file in either of our offices to show that these lands were

ever regularly entered or located and due return made thereof according to law, except such evidence as was exhibited by the pre-emption abstract from Batesville, under the act of 1814, and the coloring of the plat. The capitol of the State of Arkansas is built upon a portion of these lands, at a cost of some 70,000 dollars or more. The corporate authorities of the city of Little Rock, as well as the inhabitants, all hold under conveyances derived from or under the pre-emption claims and against the New Madrid claims, either by a compromise made by the respective claimants about the
16 year 1821 or by the decision of the land office at Batesville, of which we are not particularly informed.

All parties within the limits of the city, we believe, are fully satisfied that these entries which embrace it will cure the defects in their titles, as no dissatisfaction is believed to exist with any one interested in the question.

These entries were therefore allowed by us, upon due reflection, under the belief that we were acting correctly in the faithful discharge of our duties, and by which the individuals who supposed they rightly claimed these lands will be enabled to obtain a perfect title and thereby save and protect the rights and titles of the numerous persons claiming under them and to whom they are bound by obligation or deed.

Herewith enclosed you will receive a copy of an obligation executed for the purpose of ultimately securing the rights of persons who derived these conveyances from any of the original claimants to those several tracts of land, which has been duly recorded according to law and will be in full force from and after the emana-
17 tion of the patents. The original has been deposited in our office as a public document for the examination of all concerned.

We are, sir, very respectfully your ob't s'v'ts,

SAM'L M. RUTHERFORD.
P. T. CRUTCHFIELD.

James Whitcomb, Esq., Commissioner of the General Land Office, Washington city, D. C.

LITTLE ROCK, ARK., 30 *Jan'y*, 1839.

The register & receiver replies to letter of the 26th ulto. and reports the reasons "why entries Nos. 3549, 3550, 3552, and 3554 were permitted to be made on land already occupied by prior claims long since located, & against the validity of which this, the Gen'l L'd Office, possesses no evidence."

Encloses a copy of an obligation executed for the purpose of ultimately securing the rights of persons who derived their conveyances from any of the original claimants to those several tracts of land.

Rec'd 6 Mar., 1839. C. S. B.

See letter to R. & R., 9 May, 1839. Rec'd 5 March, 1839.

18 Endorsed: U. S. *vs.* Bebee *et al.* Exhibit I to bill. Filed Feb'y 27, 1883. Ralph L. Goodrich, clerk.

19 LAND OFFICE, LITTLE ROCK, *January 30th*, 1839.

SIR: Your letter of the 26th ultimo has been received requiring us to report the reasons "why entries No. 3549, 3550, 3552, and 2554 were permitted to be made on lands already occupied by prior claims long since located, and against the validity of which this (your) office possesses no evidence."

In reply we have to state that those entries were permitted in conjunction with 3556 upon the demand of Roswell Beebe and the several allegations made by him, setting forth and showing conclusively that the Treasury Department had disallowed the pre-emption claims granted under the act of 1814 upon all lands south of the Arkansas ceded by the Quapaw treaties of 1818 and 1824, including the pre-emption at this place, upon the grounds that the Indian title to these lands had not been extinguished at the time of the passage of that law, and that the validity of these locations depended upon the same principle and would no doubt be governed by the same rule of decision, and at which time no one here or elsewhere, so far as we have knowledge, had ever set up any claim to these lands, excepting persons desiring conveyances from those who had supposed they rightfully held from the United States under the pre-emption act of 1814 and the New Madrid locations.

The original plat of survey embracing these entries was at the time complete and represented the subdivisional lines and the number of acres corresponding, respectively, with those certificates of entry, and there was no evidence of proper record on file in either of our offices to show that these lands were ever regularly entered or located and due return made thereof according to law,

20 except such evidence as was exhibited by the pre-emption abstract from Batesville, under the act of 1814, and the coloring of the plat. The capitol of the State of Arkansas is built upon a portion of these lands, at a cost of some $70,000 *dollars* or more. The corporate authorities of the city of Little Rock, as well as the inhabitants, all hold under conveyances derived from or under the pre-emption claim and against the New Madrid claims, either by a compromise made by the respective claimants about the year 1821 or by decisions of the land officers at Batesville, of which we are not particularly informed.

All parties within the limits of the city, we believe, are fully satisfied that these entries which embraced it will cure the defects in their titles, as no dissatisfaction is known to exist with any one interested in the question. Those entries were therefore allowed by us upon due reflection, under the belief that we were acting correctly in the faithful discharge of our duties, and by which the individuals who supposed they rightfully claimed these lands will be enabled to obtain a perfect title, and thereby save and protect the rights and titles of numerous persons claiming under them and to whom they are bound by obligation or deed.

Herewith enclosed you will receive a copy of an obligation executed for the purpose of ultimately securing the rights of persons who desired (derived?) their conveyances from any of the original

claimants to those several tracts of lands, which has been duly recorded according to law and will be in force from and after the emanation of the patents. The original has been deposited in our office as a public document for the examination of all concerned.

We are, sir, very respectfully, your obedient servants,

SAM'L M. RUTHERFORD.
P. T. CRUTCHFIELD.

Jas. Whitcomb, Esq., Commissioner of the General Land Office, Washington, D. C.

21 Copy.

This instrument of writing, made the 6th day of July, 1838, by and between Roswell Beebe, of the city of Little Rock, in the State of Arkansas, of the one part, and the mayor and aldermen of said city of Little Rock, in behalf of said city as well as in behalf of the State of Arkansas, and also in behalf of any person or persons who may have in his own right a proper and regular chain of conveyance or conveyances of any town lot or lots situate in the first original town or city of Little Rock, derived from, by, or under any one or more of the original owners and proprietors of the said town, as aforesaid, and as represented upon the first original plan as then surveyed and laid off into town lots, of the other part, witnesseth:

That whereas the said Roswell Beebe has caused to be located and entered with pre-emption floating claims at the land office at Little Rock, and upon which the city as aforesaid (west of the Quapaw line) is now built, the following-described tracts or parcels of land, to wit: The northeast fractional quarter of fractional section three (south of the Arkansas river) and the west fractional parts of the northwest and northeast fractional section two (north of the Arkansas river and west of the Quapaw line), all in township one north, of the base line, of range twelve west, of the fifth principal meridian; and whereas the original town of Little Rock, as aforesaid, west of the Quapaw line, now composing a part of said city, as aforesaid, is included and embraced within the tracts of land which the said Roswell has caused to be located and entered as aforesaid; and whereas the said Roswell is willing and desirous, should patents be hereafter issued to him and his heirs by the United States for the said several tracts of land, by virtue of the locations and entries as aforesaid, and which now embrace a part of the said original town, as aforesaid, now a part of said city, to convey a quitclaim deed or deeds only to said mayor and aldermen, in behalf of said city, and to said State,

22 and to any person or persons, his, her, or their heirs, all and every right, title, interest, claim, and demand which the said Roswell may acquire in and to the said tracts of land, by reason of the locations and issuing of the patents as aforesaid, to any lot or lots in said city to which they or either of them or their heirs or either of them may claim by a regular chain of conveyances or conveyance derived from, by, or under some one or more of the original owners and proprietors of the said original town (west of the Quapaw line), now a part of said city as aforesaid

Now, therefore, know all men by these presents that the said Roswell, in consideration of the premises, and also in consideration of one dollar to him in hand paid by the said mayor and aldermen of the said city of Little Rock, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth hereby, for himself, his heirs, executors, and administrators, promise, covenant, and agree that on the final issuance of the patents by virtue of the said locations and entries, which embrace said original town as aforesaid, he, the said Roswell, his heirs, executors, and administrators, will, at the reasonable demand of the said mayor and aldermen of said city, or of the State of Arkansas, or of any person or persons, his, her, or their heirs, who may claim any lot or lots in said city as aforesaid by virtue of a proper and regular chain of conveyance derived from, by, or under some one or more of said original properties (proprietors?) as aforesaid, execute or cause to be executed unto the said mayor and aldermen, in behalf of said city, and to their successors in office, and unto the State of Arkansas and unto any person or persons, or his, her, or their heirs as aforesaid, a quitclaim deed or deeds of relinquishment, thereby assigning, transferring, or setting over all and every the right, title, and interest, claim and demand, whatsoever which the said Roswell may, might, or shall have acquired to each and every lot or lots so assigned and set over by reason and means of the
23 locations and entries and the issuing of the patents as aforesaid, and al o with the explicit understanding that when the said deeds are so made there shall not be had any other or further recourse to or from said Roswell whatsoever, and such relinquishment of dower to the premises so assigned as may have been acquired only by the means aforesaid shall be made provided said deed or deeds shall be demanded within a reasonable time after the issuance of the said patents as aforesaid, and the whole charges and expenses of making the same shall be wholly paid by the grantee or grantees therein named or by some one representing him, her, or them: Provided further, That previous to the execution by the said Roswell or his heirs or executors or administrators *or* of any such deed or deeds as aforesaid the grantee or grantees to be therein named shall and will produce to the said Roswell, his heirs, executors, or administrators, the proper and regular chain of such grantee or grantees to the town lot or lots which may be demanded to be quitclaimed and relinquished by the said Roswell, his heirs, executors, or administrators as aforesaid, showing thereby that said grantee or grantees claim the same by virtue of a proper, regular chain of conveyance or conveyances for such town lot or lots and derived also from, by, or under some one or more of the said original owners or proprietors of said town as aforesaid:

Provided always, nevertheless, that these presents further witness that whereas there may be adverse or conflicting claims presented to said Roswell and deeds of relinquishment demanded therefor, therefore it is further and more distinctly understood that the said Roswell, his heirs, executors, and administrators, shall have and by these presents does reserve the full, perfect, and absolute right and

power to execute or cause to be executed any and all the said deeds of relinquishment which may — demanded of him or them of either of them as aforesaid either to the holder or claimant of any lot or lots derived or claimed by bond or conveyance made by or derived
24 from, by, or under Chester Ashley or to any of the original owners or proprietors of the said town, or he may make the same unto the said Ashley, his heirs or assigns, for any or all lots which may have been conveyed to him by deed, bond, or otherewise, anything to the contrary herein contained notwithstanding, provided the claimant or claimants of said lot or lots so demanded to be relinquished claim the same by bond or conveyance from, by, or under said Ashley, or he may make the same to any one or more of the said original proprietors of said original town as aforesaid provided the proper claimant or claimants of said lot or lots so demanded to be relinquished claim the same by bond or conveyance made by or derived from, by, or under any one or more of said original owners and proprietors to whom said deed or deeds may be made as aforesaid; and provided also that the said Roswell shall not be obligated or bound by anything herein contained to make one or more deeds as aforesaid to any of the said original owners and proprietors as aforesaid or to their heirs, or to any claimant or claimants whatsoever whose original conveyance or conveyances were not acquired by her, him, or them or some one or more prior claimant or claimants from, by, or under some one or more of the said original owners or proprietors of the town as aforesaid prior to these presents; and, moreover, in order to prevent as far as possible all further disputes which might arise from the existence of any one or more adverse or conflicting claims to said lots, therefore the said Roswell shall not by these presents be obligated in making deeds, as aforesaid, to consider a younger claim at the expense of an older one, wherein the rights on the face of the original and subsequent conveyance are equal, and wherein a deed has once been made, as aforesaid, for any of the said lots no subsequent demand made by any other claimant therefor shall be entitled to any consideration whatever; and, furthermore, nothing herein con-
25 tained shall ever be so understood, either as expressed or implied, that can or shall make the said Roswell in anywise responsible or liable for any claim or title or for any defect therein; and, lastly, a refusal on the part of the United States to issue the patents as aforesaid shall henceforth and forever makes these presents and every matter and thing therein contained utterly null and void.

In witness whereof the said Roswell Bebe has hereunto set his hand and seal the day and year first above written.

ROSWELL BEBE. [SEAL.]

Signed, sealed, and delivered in presence of us—
JOHN HUTT.
ANTHONY CREASE.

STATE OF ARKANSAS, } ss:
County of Pulaski, }

Be it remembered that on the sixth day of July, eighteen hundred and thirty-eight, personally appeared before me, John Hutt, a justice of the peace in and for the county and State aforesaid, the hereinbefore-named Roswell Beebe, to me personally known,
26 and acknowledged the foregoing instrument of writing as for his act and deed for the uses and purposes therein contained and expressed.

In testimony whereof I have hereunto set my hand as a justice of the peace on the day and year last aforesaid.

JOHN HUTT, *J. P.*

STATE OF ARKANSAS, } ss:
County of Pulaski, }

I, Lemuel R. Lincoln, clerk of the circuit court and *ex officio* recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the first day of September, 1838, and the same is now duly recorded in Record Book R, page 684.

In testimony whereof I have hereunto set my hand and affixed the seal of my office, at Little Rock, the 3d day of September, in the year of our Lord one thousand eight hundred and thirty-eight, and of the Independence of the United States the 63d year.

[SEAL.] LEMUEL R. LINCOLN,
Clerk and ex Officio Recorder.

27 GENERAL LAND OFFICE, *May 25th*, 1839.

GENTLEMEN: The location of parts of T. 1 N., R. 12 W., by the floats of Geo. Harris, No. 3550, and Jackson Crain and Joel Crain, No. 3553, of the Little Rock district, upon which patents have been registered, cannot, in the present condition of the evidence before this office, be sanctioned, inasmuch as they appear to have been made without a compliance on the part of claimants with the requisitions of my circular of 11th October, 1837, respecting improvements. Their interference, also, with New Madrid claims of Peter Prier, No. 15, and Ely Dijarlois (No. 264) forms another objection, as this question of the validity of these latter claims on the point raised in your argument submit-ed in this matter has not yet been fully determined, and is held up for further consideration. The latter consideration will prevent patents issuing on the five
28 section claims which interfere with the New Madrid claim of Henry Cockerheth (No. 156).

Respectfully, your ob't servant,

JAMES WHITCOMB.

Mess. King & Wilson, Washington.

29 LAND OFFICE, LITTLE ROCK, *July 15th*, 1839.

SIR: We here enclose to your office the claims of William Cummins, Nicholas Peaz, and Richard C. Byrd to the right of pre-

emption under the act of the 11th June, 1834, on land upon which a portion of the city of Little Rock is located, and being a part of the same lands formerly covered by the pre-emption claims of William Russell, as assignee, &c., under the act of 1814 (set aside and annulled by you last month), together with an agreement addressed to this office by the said William Cummins, which we also herewith enclose for your consideration at his request. As *to* the testimony on each of these claims shows that a number of persons cultivated and possessed their respective improvements at the time required by the act of 19th June, 1834, and does not show who were the two first actual settlers, we respectfully desire to know whether, under the law, they can by agreement and all claim together the right of
30 pre-emption in one tract.

The lands now claimed by the above individuals under the act of 1834 were covered by the location above named of William Russell during the existence of the act of 1834, by which these individuals were prevented from perfecting their rights. We would therefore respectfully desire to know whether that circumstance is a sufficient excuse in law, in not proving their claims during the existence of the law of 1834.

We stated in our letter of the 30th of January last that we believed there was no dissatisfaction evidenced as to the location of the floats in this town in June of the last year; neither do we now know of any particular dissatisfaction on the subject, further than the very great anxiety with which every person is impressed to obtain a perfect title to the property claimed and purchased by him and the doubt entertained by some of obtaining the same through and by the location of said floats.

31 The individual who located these floats in June of last year entered into an obligation and covenanted, a copy of which we transmitted to you with our letter of January 30th last, by which he agreed, in case the lands so located by him should be patented to him, he would convey title to all persons holding improvements on the lands so located and during their conveyances from any of the original locations or proprietors of the town, which we know *which we know* was all that the set-lers, occupants, and purchasers of town lots desired.

Sum-, however, entertain a doubt that they can hereafter enforce by law the covenant of the individual so made for said purposes, and, being impressed with these views, do now claim at the hands of the Government their right of pre-emption on these lands under the act of 1834 by presenting their claims as aforementioned,
32 on which we have asked your legal advice as aforesaid. As the location of William Russell aforesaid was suspended in your office for near- twenty years and was not officially annulled and set aside until last month, and not being able to divine what may be the final decision in relation to the other claims to the lands which include this city, and being, both of us, deeply interested as proprietors of property and town lots, we have joined a number of other citizens in appealing to Congress by memorial to

confirm and make valid the said location of William Russell, from whom we all desire conveyances of our town property.

We have the honor to be, sir,

Very respectfully, your obedient servant,

P. T. CRUTCHFIELD.

——— ———.

James Whitcomb, Esq., Commissioner of the General Land Office, Washington, D. C.

33 To the honorable the Senate and House of Representatives of the United States in Congress assembled:

Your memorialists, citizens and property-holders of the city of Little Rock, in the State of Arkansas, respectfully represent that many years since, under the act of Congress approved in the year 1814, granting pre-emption rights to settlers on the public lands, one Benjamin Murphy and White made proof and established before the proper land officers their right to pre-emption upon the northwest fractional quarter of section number two and the north fractional quarter of section number three, all in township number one north of range twelve west, west of the Quapaw line and south of the Arkansas river, in the district of lands (now situated in the Little Rock district) of the then Territory of Arkansas.

34 Your memorialists would further represent that the said pre-emption right of Murphy and White was conveyed to one William Russell many years since, and by the said Russell and others laid out in town lots and a town regularly established (now the city of Little Rock); that your memorialists and others purchased in good faith, from the said Russell and the other persons representing themselves as owners and proprietors of the lands aforesaid, many lots; that they have enjoyed quiet and peaceable possession of these lots they purchased, and that under the full and confident belief that the pre-emption of the original proprietors, together with their conveyance to William Russell, was sanctioned and confirmed by the Government, many of the lots so purchased have passed through the hands of various individuals for the last nineteen or twenty years; that large and valuable improvements have been made upon said lands, such as state-house, court-house, &c., and, in fact, that the private and public improve-

35 ments will amount to, at this time, *to* several millions of dollars.

Your memorialists would further represent that they have recently learned that by a decision of the Commissioner of the General Land Office, the Secretary of the Treasu*er*, or the Attorney General of the United States the said pre-emption claim of Murphy, &c., was annulled and set aside.

Your memorialists would further represent that they are informed that one Roswell Bebee has located within the last twelve months some floating pre-emptions, or rather claims, upon the aforementioned lands, and that he is now using his best exertions to obtain a patent for the same.

Your memorialists, believing in the rectitude of our own course and confiding in the honesty of those from whom they derived title to the lots in the city of Little Rock, have ever believed that they were safe from the intrusions of artful and designing specu-
36 lators. They would respectfully represent to your honorable body the distress which must inevitably ensue if the lands above described are not confirmed to the assignees of the original pre-emptors, or so arranged that the present owners and occupants of lots are not secured in the enjoyment of their rights thus obtained. They respectfully and earnestly request your honorable body to confirm the original location, and to secure by such laws as may be necessary each and every individual now owning property or lots derived from the original proprietors of said town of Little Rock, either directly or indirectly. The number of individuals involved in this matter your memorialists would represent *be* be numerous.

DANIEL McGALLOWAY.
WILLIAM FIELD.
NORMAN BOARDMAN.
CHARLES CALDWELL.
SAMUEL P. BADGETT.
HARRIS SCULL.
ELIAS GOOD.
W. M. STEPHENSON.
W. H. MORRIS.
R. C. BYRD.
W. R. GIBSON.
JOHN HUTT.
L. GIBSON.
C. P. BERTRAND.
JOSEPH R. BITTISON.
JEFFERSON SMITH.
37 THOMAS W. NEWTON.
B. WILLIAMS.
JOSEPH NEWTON.
CHARLES RIPLEY.
W. PRATHER.
L. REARDON.
38 J. G. BUDD.
E. WALTERS.
NICHOLAS PEAZ.
JAMES LAWSON, JR.
W. F. POPE.
JAMES PITCHER.
M. PEACH.
S. M. WEAVER.
W. CUMMINS.
BENJAMIN LIMBAUGH.
SAMUEL M. RUTHERFORD.
W. W. ADAMS.
J. R. ROBINSON.
S. D. BLACKBURN.

JOHN E. REARDON.
S. H. WEBB.
R. J. HUTT.
S. H. HUTCHINGS.
S. H. TUCKER.
ABRAHAM RAPLEY.
SIMON BUCKNER.
B. W. OWNES.
D. W. CARROLL.
J. B. BADGETT.
L. G. REARDON.
F. G. THIBAULT.
E. R. WOODS.
G. W. KINDER.
JULIAN IMBEAU.
R. F. DUNN.
THOMAS C. BROWN.
JOHN PERCEFULL.
LISTER LYON.
W. L. CROSS.
W. C. BECK.
JOHN P. SMITH.
H. HARALSON.
DARWIN LINSEY.
JOHN W. HAROLSON.
JACOB BENTON.
M. CUNNINGHAM.
THOMAS PARSELL.
GEORGE H. BENNETT.
JOHN DERING.
LEMUEL ADAMS.
DANIEL BOARDMAN.
ALEXANDER BOILEAU.
ALDEN SPRAGUE.
DANIEL McDONALD.
ROBERT W. JOHNSON.
ALBERT PIKE.

39 WASHINGTON CITY, 28*th August*, 1839.

SIR: Herein enclosed you will receive the affidavits of James De Baum and William E. Woodruff, Esq., United States pension agent for the State of Arkansas, which I beg leave to file in your Department to show the absurd position in which William Cummins, Richard C. Byrd, and Nicholas Peaz, respectively, claim the right of pre-emption to the lands upon which the city of Little Rock is built, under the act of June 19th, 1834, are placed and would be, even admitting their proof to have been filed within the life of the law; also the certificate of the clerk *of the clerk* of that county, which exhibits the notorious fact that neither of these persons claiming the right of pre-emption were the owners of any

property in said city west of the Quapaw line at that time. The witnesses in these cases are C. P. Bertrand, W. W. Stevenson, Wm. Field, and Matthews Cunningham, neither of whom own any lots in that part of the city, except Bertrand, who, I believe, owns one or more.

And I would further state, of my own knowledge, that Bertrand and Stevenson are part owners of the new town of De Cantillon, laid off on the opposite bank of the River Arkansas, and that Cunningham is the father-in-law of Bertrand; that Byrd, Bertrand, and Stevenson own a large property in the new addition to the city east of the Quapaw line. The others, having no direct interest in the matter, are no doubt actuated either by personal or political motives, which, in this business, they no doubt deem a sufficient justification for their course. Procrastination is all they can expect to gain, which, of *of* itself, would tend to build up these rival places in which most of them are some way interested, and at the same time retard the future growth and prosperity of the city west of the Quapaw line. Then it will be readily seen that those persons form a sort of coalition, to whom I care not for, according to my good motive. Cunningham, being their leader and having been twice defeated in his efforts to gain a seat in Congress, now, in order to promote his influence at the ballot-box by those insidious demagogues, means to subvert the sacred rights of those whose political suffrage he has never -presented and failed to obtain.

And I now again respectfully reiterate the assertion that these persons, moving in this business solely for the purpose of prejudicing and influencing the Department against my location, have no lots in that part of the city, and I further state, without fear of contradiction, that none of the property-holders or original proprietors have, as yet, taken any steps to prevent the issuing of the patents in these cases. It is, however, true that some have signed the memorial to Congress now in your office from the improper statements made to them at the moment or without knowing or caring anything about the matter; while others have done so, perhaps, from fear, affection, or other local causes. It is proper, also, to remark that said memorial is signed by 89 persons, about 27 of which are property-holders, and that about 62 are not holders of any lots in the said city, out of which number of property-holders 20 of them, owning some 95 lots, would, without any hesitation, give their written assent to the locations. The 7 others, owning about 19 lots, I presume would not do so from personal considerations; therefore it seems to me perfectly clear that the rights of individuals should not be prejudiced by designing persons having no right to interfere and striving to elevate themselves by the downfall and ruin of others.

My motives for making any political reference in this matter is upon the ground that in a new country like Arkansas a difference of opinion upon political matters is considered a good and sufficient reason for an uncompromising opposition—opposition in all the various relations of life.

The statement made by Cunningham in his letter to you, dated

some time last month, relative to the invalidity and insufficiency of my bond, is untrue and without the shadow of a foundation.

It has been frequently examined by the best legal men in the State, who are property-holders in the city to a large amount, and pronounced valid in law and satisfactory.

44 Amongst these are the judges of the United States district court for Arkansas, the chief justice of the State, the Hon. A. H. Sevier, Mr. S. Fulton, and Edw. Cross, the members of Congress from the State; the United — district attorney, and many others of legal ability.

I am, sir, very respectfully, your obedient servant,

ROSWELL BEEBE.

Hon. James Whitcom, Com. of Gen. Land Office, Washington city, D. C.

45 GENERAL LAND OFFICE, *September* 18, 1839.

SIR: Having received the report from the register and receiver at Little Rock requested in my letter of the —th of May last, and to which allusion was made in mine to you on the same subject, dated 31st of same month, I have the honor herewith to transmit, agreeably to your request of the —th of June last, the papers in the Little Rock case, then returned by you, together with those received with the report above mentioned, dated 29th July, 1839, as well as others which have reached this office since the last action had by me in the matter. The lands embraced in the present case (exclusive of the claim of Cockerham under the New Madrid location) are the northwest fr'l qr. and W. ½ S. W. qr. 2, N. E. fr'l qr. and S. E. qr. 3, T. 1 N., R. 12 W., all north of the Arkansas river and west of the Quapaw line, and have been claimed and entered as follows:

The whole of the tracts, except a small fraction of the W.
46 ¼, S. W. Q., and covered by the New Madrid claims of Peter Prier and Eloi Dejarlois under law of 17th February, 1815; N. E. frct. qr. 3, by pre-emption entry No. 241, in the name of William Russell; S. E. qr. 3, claimed by Matthew Cunningham under the act of 26th May, 1824; by the same person under the act of 29th May, 1840; same tract, claimed by Christian Brumbach under act of 29th May, 1830, and also by Gen. Pope under an act of 15th June, 1832, and also by Elizabeth Bacchus under act of 22 June, 1838; the N. E. fr'l qr. 3, claimed by William Cummins under act of 19th June, 1834; the N. W. fr'l qr. 3, claimed by Richard C. Byrd and Nicholas Peaz under the act of 19th June, 1834, and the floats Nos. 3549, 3550, 3552, and 3554, certificates for which have been issued at Little Rock, cover all the tracts above mentioned. The entry No. 241 under the act of 1814, the claim of Elizabeth Bacchus, that of William Cummins, those of Richard C. Byrd and Nicholas Peaz, and the claim of Matthews Cunningham under the act of 26th
47 May, 1824, have all been heretofore disposed of, and the only claims to be examined are the New Madrid locations, the claims under the act of 1830 of Brumbach and Cunningham, that

of Gov. Pope under the act of 15th June, 1832, and the floats under the act of 19th June, 1834, except that as the Cunningham claim under the act of 26th May, 1834, was rejected when a different opinion as to the validity of the New Madrid claim was entertained. It might claim a rehearing on its merits, divested of the influence which the consideration of the valid character of the latter claims may have had in such decisions. The prior claims of all are those under the act of February 17th, 1815, in the names of Prier and Dejarlois. That act grants the rights claimed by the parties to lands only the sale of which is authorized by law, and as at the date of that act the land located belonged to the Quapaw Indians, these locations, in my opinion, are void under the opinion of the Attorney General of December 4, 1826, and 3d May, 1836. Other objections existed to them in common with other claims under the original law
48 which the acts of 26th April, 1822, and 2d March, 1827, would have remedied but for the vital objection above mentioned.

Nothing appears to prevent the confirmation of the floats but a want of compliance with the directions in a circular from the office, dated 10th October, 1837, requiring the written consent of those upon improved lands to be filed when such land is applied for. As those floats were filed to secure the title to the holders of the New Madrid locations and the pre-emption claims under the act of 1814, from whom conveyances to individuals for all the town lots are said to be devised (derived ?), and as the floating claimant has entered into bond for the conveyance to them of all the title he shall acquire by the issuing of a patent on these floats, it is respectfully submitted whether the spirit of that circular has not been complied with by the filing of that bond, particularly as no objection has been made except by those claiming part of the same land by pre-emption, and as numerous letters from alleged large property-holders in the city of Little Rock have been received (and herewith transmitted) urging the
49 confirmation of the floats as the only means of securing their titles, heretofore deemed good, and expressing the fullest confidence that the bond aforesaid upon such confirmation will effect that object.

Respectfully your obedient servant,

JAMES WHITCOMB, *Com'r.*

Hon. Levi Woodbury, Secretary of the Treasury.

TREASURY DEPARTMENT, *24th Sept.*, 1839.

SIR: Under the views presented in your letter of the 18th instant, I see no sufficient objection to the confirmation of the floating entries and the issue of patents thereupon.

I am, respectfully, sir, your obedient servant,

LEVI WOODBURY,
Secretary of the Treasury.

Commissioner of the General Land Office.

P. S.—All the papers are herewith returned.

Endorsed: Ex. I, I¹, I², &c., to bill. Filed June 18, 1883. Ralph L. Goodrich, clerk.

50 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Whereas in a certain suit in said circuit court between the United States of America, by her Attorney General, Benjamin H. Brewster, complainant, and Charles W. Beebe *et al.*, defendants, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"Because of the omission therefrom of what are called in the bill the exemplifications of the opinion of Hon. J. Whitcomb, Commissioner, &c., and of the letter of the register and receiver at Little Rock, and of the bond of said Beebe and other letters and documents in reference thereto therewith filed and marked Exhibits I, I^1, I^2, I^3, I^4, I^5," etc.

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 17th day of January, A. D. 1888.

JAMES H. McKENNEY,
Clerk Supreme Court of the United States.

51 UNITED STATES OF AMERICA, }
Eastern District of Arkansas, } *ss:*

In obedience to the within writ I hereby certify and send up to the Supreme Court of the United States the copies hereto annexed, which I certify to be true and perfect transcripts from the papers on file in the circuit court of the United States for said district in the cause named in said writ.

In testimony whereof I, Ralph L. Goodrich, clerk of said circuit court, hereto set my hand and the seal of said court, at the city of Little Rock, on this 23d day of January, 1888.

{ Seal of the Circuit Court, U. S. A., Western Division of East. Dist. Ark. }

RALPH L. GOODRICH, *Clerk.*

[Endorsed:] Supreme Court U. S. October term, 1887. No. 180. The United States, appellant, *vs.* Charles W. Beebe *et al.* Writ of certiorari and return. Filed Jan'y 26, 1888.

of Gov. Pope under the act of 15th June, 1832, and the floats under the act of 19th June, 1834, except that as the Cunningham claim under the act of 26th May, 1834, was rejected when a different opinion as to the validity of the New Madrid claim was entertained. It might claim a rehearing on its merits, divested of the influence which the consideration of the valid character of the latter claims may have had in such decisions. The prior claims of all are those under the act of February 17th, 1815, in the names of Prier and Dejarlois. That act grants the rights claimed by the parties to lands only the sale of which is authorized by law, and as at the date of that act the land located belonged to the Quapaw Indians, these locations, in my opinion, are void under the opinion of the Attorney General of December 4, 1826, and 3d May, 1836. Other objections existed to them in common with other claims under the original law
48 which the acts of 26th April, 1822, and 2d March, 1827, would have remedied but for the vital objection above mentioned.

Nothing appears to prevent the confirmation of the floats but a want of compliance with the directions in a circular from the office, dated 10th October, 1837, requiring the written consent of those upon improved lands to be filed when such land is applied for. As those floats were filed to secure the title to the holders of the New Madrid locations and the pre-emption claims under the act of 1814, from whom conveyances to individuals for all the town lots are said to be devised (derived ?), and as the floating claimant has entered into bond for the conveyance to them of all the title he shall acquire by the issuing of a patent on these floats, it is respectfully submitted whether the spirit of that circular has not been complied with by the filing of that bond, particularly as no objection has been made except by those claiming part of the same land by pre-emption, and as numerous letters from alleged large property-holders in the city of Little Rock have been received (and herewith transmitted) urging the
49 confirmation of the floats as the only means of securing their titles, heretofore deemed good, and expressing the fullest confidence that the bond aforesaid upon such confirmation will effect that object.

Respectfully your obedient servant,

JAMES WHITCOMB, *Com'r.*

Hon. Levi Woodbury, Secretary of the Treasury.

TREASURY DEPARTMENT, 24*th Sept.*, 1839.

SIR: Under the views presented in your letter of the 18th instant, I see no sufficient objection to the confirmation of the floating entries and the issue of patents thereupon.

I am, respectfully, sir, your obedient servant,

LEVI WOODBURY,
Secretary of the Treasury.

Commissioner of the General Land Office.

P. S.—All the papers are herewith returned.

Endorsed: Ex. I, I¹, I², &c., to bill. Filed June 18, 1883. Ralph L. Goodrich, clerk.

50 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Whereas in a certain suit in said circuit court between the United States of America, by her Attorney General, Benjamin H. Brewster, complainant, and Charles W. Beebe *et al.*, defendants, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"Because of the omission therefrom of what are called in the bill the exemplifications of the opinion of Hon. J. Whitcomb, Commissioner, &c., and of the letter of the register and receiver at Little Rock, and of the bond of said Beebe and other letters and documents in reference thereto therewith filed and marked Exhibits I, I^1, I^2, I^3, I^4, I^5," etc.

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 17th day of January, A. D. 1888.

JAMES H. McKENNEY,
Clerk Supreme Court of the United States.

51 UNITED STATES OF AMERICA, *Eastern District of Arkansas,* } *ss:*

In obedience to the within writ I hereby certify and send up to the Supreme Court of the United States the copies hereto annexed, which I certify to be true and perfect transcripts from the papers on file in the circuit court of the United States for said district in the cause named in said writ.

In testimony whereof I, Ralph L. Goodrich, clerk of said circuit court, hereto set my hand and the seal of said court, at the city of Little Rock, on this 23d day of January, 1888.

{ Seal of the Circuit Court, U. S. A., Western Division of East. Dist. Ark. }

RALPH L. GOODRICH, *Clerk.*

[Endorsed:] Supreme Court U. S. October term, 1887. No. 180. The United States, appellant, *vs.* Charles W. Beebe *et al.* Writ of certiorari and return. Filed Jan'y 26, 1888.

127-338

127-338

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, Appellant,

vs.

CHARLES W. BEEBE ET AL.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

UNITED STATES, *Eastern District of Arkansas:*

On this day came before me, a notary public within and for the County of Pulaski, in said district, U. M. Rose, to me well known, who being duly sworn, deposed as follows:

"I was of counsel for defence in this cause in the court below. At that time and ever since my law firm has been composed of myself and my son G. B. Rose. I am as certain as I can be of anything in my past experience that Liberty Bartlett never spoke to me, or conferred with me in any way, about the transcript in this cause at any time."

U. M. ROSE.

Sworn to and subscribed before me.

Witness my hand and seal as such notary, at the City of Little Rock, on this 17th day of November, 1887.

[SEAL] J. E. ENGLAND,
Notary Public.

And on the same day appeared before me G. B. Rose, to me well known, and being duly sworn, he says: "I was a member of the law firm of U. M. & G. B. Rose when this cause was heard in the court below, and have been ever since, and I state that I never heard anything said by Liberty Bartlett as to the transcript in this cause, or as to the manner in which it should be made."

G. B. ROSE.

Sworn to and subscribed before me.

Witness my hand and official seal at the City of Little Rock, on this 17th day of November, 1887.

[SEAL] J. E. ENGLAND,
Notary Public.

(Endorsed:) Sup. Court U. S. 1887, Oct. Term, No. 180. The United States, Appt., *vs.* Chas. W. Beebe, *et al.* Affidavit of U. M. Rose and G. B. Rose. Filed Nov. 21, 1887.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

On this day came before me, Ralph L. Goodrich, clerk U. S. circuit court for above district, W. P. Feild, who, being duly sworn, says: I was the deputy clerk of the United States circuit court for said district when the transcript was ordered and made up for the Supreme Court in the case of United States *v.* Charles W. Beebe, and I made it up in accordance with a written precipe furnished the clerk of said circuit court, signed by Liberty Bartlett, which is on file in the office of said clerk and of which a copy is hereto annexed.

W. P. FEILD.

Subscribed and sworn to before me this 18th day of November, A. D. 1887.

{ Seal Ralph L. Goodrich, United States Commissioner, Eastern District of Arkansas, U. S. A. }

RALPH L. GOODRICH,
Com'r U. S. Cir. C't, E. D. Ark's, W. D.

Copy of Form for Transcript.

Caption.

Be it remembered that on the 31st day of January, 1883, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas The United States of America, by her Attorney General, Benj. H. Brewster, and by Liberty Bartlett and Cummings and Baker, Esqs., their solicitors, and filed therein their bill of complaint against Charles W. Beebe *et al.*, which bill of complaint is as follows:

Bill. (1)
Oct. term, 1882.

Record D, page 639.
Which motion to require plaintiff to file exhibits is as follows: (2)
Which motion for bond for costs is as follows: (3)

Record D, page 643.
Which demurrer is as follows:
Demurrer. (4)

Which plea is as follows: (5)
Which motion to dismiss is as follows: (6)
Which motion to compel complainants to file exhibits is as follows: (7)

Record D, page 645.
Which plea to statute of limitations is as follows: (8)

Record D, page 654.
Which replication to plea—statute limitations—is as follows: (9)
Which motion to set demurrer for hearing is as follows: (10)
Which motion to set pleas for hearing is as follows: (11)

Record D, page 656.
Which affidavit is as follows: (12)

Record D, page 658.
Which demurrer of Ratcliffe, &c., is as follows: (13)
Which affidavit is as follows:
Affidavit to be supplied by Judge Bartlett. (14)

Which letter is as follows: (15)
Which petition to remove is as follows: (16)

And on April 17, 1883, the following:
Record D, page 665.
Which letter is as follows: (17)

And on April 19, 1883, as follows:
Record D, page 671.

And on May 10, 1883, the following:
Record D, page 680.
Which motion is as follows: (18)

And on June 30, 1883, the following:
Record D, page 712.

And on October 13, 1883, the following:
Record E, page 2.
Which amended bill is as follows: (19)

And on October 20, 1883, the following:
Record E, page 4.
Which demurrer is as follows: (20)

And on October 22, 1883, the following:
Record E, page 5.
Which plea is as follows: (21)
Which motion to dismiss is as follows: (22)
Which motion of Kate Faust is as follows: (23)

And on December 3, 1883, the following:
Record E, page 20.

Which replication to defendants' pleas to amended bill is as follows: (24)

Which motion to set demurrers and pleas down for hearing is as follows: (25)

And on April 18, 1884, the following:
Record E, page 118.

The clerk will make transcript of the record in case of United States *vs.* Chas. W. Beebe *et al.* for Supreme Court United States in manner and form as above set out.

(Signed) LIBERTY BARTLETT,
Sol. for Pl't'ff.

[Endorsed:] Sup. Court U. S. 1887, Oct'r term. No. 180. The United States, app't, *vs.* Chas. W. Beebe & *al.* Affidavit of W. P. Feild. Filed Nov. 22, 1887.

Office Supreme Court U. S.
FEB 3 1888
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

vs.

CHARLES W. BEEBE *et al.*

BRIEF FOR APPELLANT.

HENRY M. BAKER,
Attorney for Appellant.

Judd & Detweiler, Printers.

Which replication to defendants' pleas to amended bill is as follows: (24)

Which motion to set demurrers and pleas down for hearing is as follows: (25)

And on April 18, 1884, the following:
Record E, page 118.

The clerk will make transcript of the record in case of United States *vs.* Chas. W. Beebe *et al.* for Supreme Court United States in manner and form as above set out.

(Signed) LIBERTY BARTLETT,
Sol. for Pl'ff.

[Endorsed:] Sup. Court U. S. 1887, Oct'r term. No. 180. The United States, app't, *vs.* Chas. W. Beebe & *al.* Affidavit of W. P. Feild. Filed Nov. 22, 1887.

24.538

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

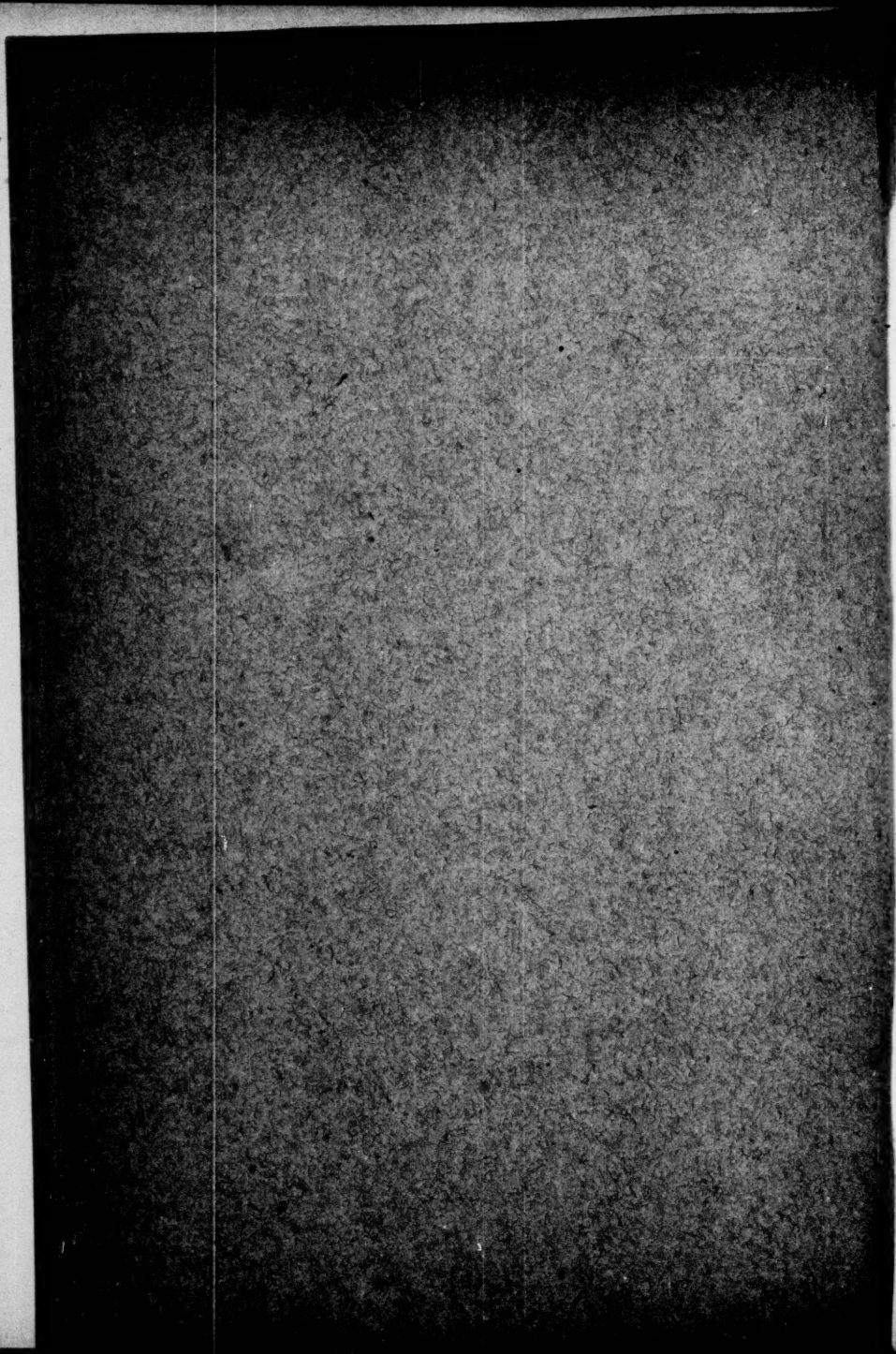
vs.

CHARLES W. BEEBE *et al.*

BRIEF FOR APPELLANT.

HENRY M. BAKER,
Attorney for Appellant.

Judd & Detweiler, Printers.



Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

vs.

CHARLES W. BEEBE *et al.*

BRIEF FOR APPELLANT.

This case is an appeal from the decision of the circuit court of the United States for the eastern district of Arkansas, granting the demurrer of the defendants to the bill of the United States, duly brought through the Attorney General, to set aside certain land patents alleged to have been illegally granted.

The bill was brought to set aside the patents illegally and fraudulently issued to Roswell Beebe under the "float" pre-emption act of 1830 and the supplemental act of July 14, 1832, covering the east half of the southeast quarter of fractional section 3 (south of Arkansas river), 80 acres, which was sold to Samuel Plummer, and upon which certificate No. 3549 was issued by the register at Little Rock June 6, 1838; the west fractional part (west Quapaw line) of the southwest fractional quarter of fractional section 2 (south of Arkansas river), $65\frac{68}{100}$ acres, which was sold to George Harris, and upon which certificate No. 3550 was issued by the register at Little Rock June 6, 1838; the south frac-

tional part (south of Arkansas river, west Quapaw line) of the northwest fractional quarter of fractional section 2, and the south fractional part (south of Arkansas river) of the northeast fractional quarter of fractional section 3, $125\frac{65}{100}$ acres, which was sold to Jackson Crain and Joel Crain, and upon which certificate No. 3552 was issued by the register at Little Rock June 6, 1838; the west half of the southeast quarter of section 3, 80 acres, which was sold to Mary Louisa Imbeau, and upon which certificate No. 3554 was issued by the register aforesaid June 7, 1838, all being in township 1, north of the base line of range 12 west, 5th principal meridian, Pulaski county, Arkansas, on which certificates of patents were issued by the United States to their common assignee, Roswell Beebe, on the 25th of September, 1839, and the west fractional part (west Quapaw line) of the northwest quarter of section 11, $65\frac{88}{100}$ acres, also in said township and range, county and State, which was sold to Baptiste Bonne, and upon which certificate No. 3556 was issued by said register at Little Rock June 7, 1837, and subsequently patented to said Roswell Beebe, his assignee, on the 30th of October, 1838, as set forth on page 4 of the transcript.

It is represented by the said bill that the lands covered by the patents above described (as well as other lands which are not made a part of this suit, as will appear by reference to pages 3 and 4 of the transcript) did not belong to the United States at the time said locations were made and patents issued and were not open to sale or disposition by the Government, for the reason that said lands had already been disposed of by the Government in the following manner, namely, that said lands had already been selected and located by virtue of "New Madrid" certificates, so called, in accordance with the provisions of "An act for the relief of the inhabitants of New Madrid who suffered by earthquake, approved February 17, 1815," and the acts in addition and amendatory thereto. It is further stated (page 1) that in

accordance with the law above named certificates had been previously issued for said lands by Frederic Bates, recorder of land titles of the United States at St. Louis, Missouri, as follows: No. 8, to Francis Lesieur, for 160 acres of land; No. 15, to Peter Porier, for 160 acres; No. 156, to Henry Cockerham, for 640 acres, and No. 264, to Elvy Dejarlois, for 160 acres of land; that under the provisions of the said New Madrid acts these certificates were duly located, as set forth on page 2 of the transcript; that these locations were duly located, surveyed, and returned by the United States surveyor to the recorder of land titles at his office, at St. Louis, on the 17th day of October, 1820; that the surveys of the lands located with certificates numbered 8, 15, and 264 were respectively numbered 2512, 2493, and 2471, and that the return of the lands located with certificate No. 156 was, according to belief, made at the same time, but for some reason not explained by any known record, the lands covered by said certificate were again surveyed and the resurvey, numbered 2489, was returned to the said recorder on May 2, 1839, and for the reason that the survey was not returned finally until 1839 the lands covered by certificate No. 156 are not included in this case. (See page 3 of the transcript.)

The lands covered by certificate No. 156 were not a part of the lands covered by the bill, but certain parties, by their attorney, Mr. Benjamin, demurred to a portion of the bill (see pages 31 and 32), and to avoid unnecessary complications a formal withdrawal of all lands under the Cockerham certificate No. 156 was made (see page 38), as it never was the intention of the complainants to include them.

The controversy is confined to the lands located under the certificates numbered 8, 15, and 264, covered by the locations and patents whose cancellation is asked for.

It is represented in said bill that said lands were located under said New Madrid certificates; that the plats thereof and the certificates of survey were duly returned to the recorder of land titles, and that by law the land was appropri-

ated and segregated from the public domain and was no longer open to sale or other disposition by the Government; that the lands were held under that title, and under no other, from the date of said return of the certificates of survey till the fraudulent patents of 1838; that under the New Madrid titles the town of Little Rock was laid out and built upon, was duly incorporated and had hundreds of inhabitants, and became the capital of the State of Arkansas, no one will dispute, for the proper public records are conclusive upon those points (pages 5, 42, 44, 45, 47, and 48). No doubt or question arose as to the validity of said titles till a conspiracy to take said lands was concocted, about the year 1837.

At the time the selections, sales, and confirmations were made and patents issued whose cancellation is asked none of said lands were unappropriated within the meaning of the acts of Congress under which they were professedly made, all having been appropriated as aforesaid by the location, surveys, and returns thereof with said New Madrid certificates.

Stoddard *v.* Chambers, 2 Howard, 284.
Barry *v.* Gamble, 3 Howard, 32.
Lessieur *v.* Price, 12 Howard, 59.
Hale *v.* Gaines *et al.*, 22 Howard, 144.
Witherspoon *v.* Duncan, 4 Wall., 218.
Rector *v.* Ashley, 6 Wall., 142.
Hot Springs Cases, 92 U. S., 698, 713.

All patents and certificates for lands so appropriated are void.

Cunningham *v.* Ashley, 14 Howard, 377, and cases above cited.
Reichart *v.* Felps, 6 Wall., 160.
Atherton *v.* Fowler, 96 U. S., 513.

The Government could now give patents to the rightful owners, except for the rule of law that forbids a second patent until the first be canceled.

Stoddard *v.* Chambers, 2 How., 284.
Bissell *v.* Penrose, 8 How., 317.
Doswell *v.* De La Lanza *et al.*, 20 How., 29.
Moore *v.* Robbins, 96 U. S., 530.
Wirth *v.* Branson, 98 U. S., 118.

As the existence of the present patents and titles, however void and illegal, are a bar to the proper disposition of the case, "as they render the United States incapable of complying with their prior engagement, it is the plain duty of the United States to seek to annul and vacate those instruments, to the end that their previous engagement may be fulfilled."

U. S. *v.* Hughes, 11 How., 552–568.
U. S. *v.* Stone, 2 Wall., 525.
Hughes *v.* U. S., 4 Wall., 232–236.
Op. Att'y Gen'l, vol. 4, p. 149.

That the proper course to be taken to set aside the fraudulent patents and titles is the course now adopted by the United States is shown by—

Garland *v.* Wynn, 20 Howard, 6.
Lytle *et al. v.* Arkansas *et al.*, 22 Howard, 193.
Lindsey *et al. v.* Hawes *et al.*, 2 Black, 559.
Minnesota *v.* Batchelder, 1 Wall., 109.
Stark *v.* Starrs, 6 Wall., 402.
Johnson *v.* Towsley, 13 Wall., 72.
Samson *v.* Smiley, 13 Wall., 91.
Moore *v.* Robbins, 96 U. S., 530.

The above authorities guided the Interior Department to the proper course to be pursued, and accordingly, after an honest investigation in that Department, extending over five years, with the same inevitable results reached in two full

and exhaustive reports on the whole matter by the General Land Office, each re-examined and endorsed by the Secretary of the Interior (and especially as this course was suggested and recommended by the present Attorney General, Mr. Garland, then Senator from Arkansas, who represented the present occupants of the land in question before the Interior Department and urged that a suit such as the present was the proper method for adjusting and determining the matter, and furnished many authorities thereon), the Interior Department, upon the urgent request and recommendation of the General Land Office, requested the bringing of the present suit. In fact, the course pursued is the very one suggested by Mr. Garland as the one to thoroughly investigate and determine the rights of the United States and all parties interested. There was no other, in view of the state of facts brought to light by the examination of the Government records. The bill was then filed by the direct authority of the Attorney General. The record shows that instead of accepting the suggestion and course advised and marked out by Attorney General Garland for the legal, equitable, and honest examination of the whole matter, and the determination of the rights of all parties, including those of the United States, the appellees have and are endeavoring to avoid the honest adjudication of the matter by every quibble and subterfuge for delay and hindrance. (See pages 13, 14, 15, 16, 17, 18, 19, 20, 57, 58, 59.)

Instead of meeting the question in the fair manner proposed by their own counsel they only seek to evade and smother an investigation and adjudication of their rights.

Looking at the legal objections raised against this bill they are found to be summed up in several general propositions, which will be considered and answered in their order:

1st. *That the bill is not prosecuted by the Attorney General of the United States in the manner in which such suit should be prosecuted to give it a standing in court.*

This objection would never have been raised had the district attorney made known the official correspondence in regard to the filing of the bill. But, as the objection rests upon an assertion which does not correspond with the facts, it will require but little notice. The bill prepared and examined in Washington, prior to submission to the district attorney, was signed by express direction of the Attorney General of the United States in the manner usual in such cases; was ratified and sanctioned by his letters of approval filed in the case, and was a bringing of the suit by him in person as fully as is possible, unless it is claimed that it is his duty to travel from State to State and from court to court, to the neglect of his duties as the head of a great department at the Capital, to give his personal assurance and submit to cross-examination.

This would be as absurd as to assert that a commercial corporation could only sue in the courts of the United States by the presence of its president and board of directors.

2d. *That there is a want of proper parties.*

As this suit is simply one by the United States to set aside patents unlawfully issued to C. W. Beebe, and Beebe having died, against his heirs, for fraud and the several grounds set forth in the bill and petition, the rights of other parties are purely consequential. The Ashley and Philbrook heirs are not in court. The rights of the Ashley and Philbrook heirs are not directly in controversy in this suit, but only the one question of the validity of the Beebe patents.

If the Beebe patents be declared void then, and not till then, will the rights of the Philbrook heirs and others be open for consideration.

As to parties claiming adverse interests who are not made defendants, if such there are, it is sufficient to say a decree will not affect them. If other parties are interested they are unknown to the United States. If, however, such appear

and show the Court they are entitled to defend against this suit no objection will be made by the appellant.

3d. *That this case and contest was settled by the Land Office when they allowed these patents to be issued on Cherokee floats and State selections, and such decision is conclusive.*

If this were a correct statement of the law it would be impossible to set aside any patent once issued, however illegal or fraudulent. If it is said there is no reason or cause for setting aside the decision of the Land Office in 1838 the question is begged, for it is simply an assertion that the Beebe patents are not illegal or fraudulent, which is the issue to be tried when the case is heard upon its merits.

The right and necessity and even duty of the United States to go into its courts to set aside patents unlawfully issued have been too often decided by the highest authorities in the land to enter upon its discussion now.

The decision of the Land Office, in issuing a land patent where an error of law or fraud is committed, is not conclusive even between private parties, and courts of equity are frequently called upon to give relief against such decisions.

Johnson *v.* Towsley, 13 Wall., 72.
Shepley *et al. v* Cowan *et al.*, 91 U. S., 330.
Moore *v.* Robbins, 96 U. S., 530.
Marquez *v.* Frisbie, 101 U. S., 473.
Steel *v.* Smelting Co., 106 U. S., 454.

The bill sets forth the decision of the Land Office and alleges that an error in law was committed thereby and a fraud perpetrated.

4th. *Urges an estoppel against the Philbrook heirs.*

As the Philbrook heirs are not parties to this suit any mention of them in the bill is merely descriptive; the objection can only be applicable and urged when the title is

restored to the United States and they make their demand for their rights under their certificates and entries. If it be found that they have forfeited their rights, that fact will not make good the illegal patent issued to Beebe. It would only leave the United States free to dispose of the land according to law.

5th. *The statement that the ruling of the Land Office in this case has since been overruled by later decisions shows no ground of equitable jurisdiction.*

The statement in the bill that the ruling of the Land Office has been overruled by later decisions is simply a statement that the decision of the Land Office was contrary to law, and therefore the Beebe patents were issued illegally, and that does form a basis for relief, and that relief which can only be obtained by a bill in equity.

"The later and better decisions" referred to simply affirm what the law is and was when the illegal patents were issued, and these later decisions deliberately impose on the courts the duty to set aside in any proper suit the irregular and illegal patents issued by the officers of the Government.

None of these objections were deemed of any weight by Judge McCrary and were denied by him, and we do not deem it profitable to occupy the time of this Court in their further discussion.

Lastly, the statute of limitations was pleaded, and this was the only defense set up by the respondents that was considered by the court as of any weight or consequence, and the entire decision of the court rests upon the point of the statute of limitations and the lapse of time as constituting a sufficient defense in this suit as against the United States.

The circuit court, in rendering its decision, says: "These considerations lead to the conclusions, *first*, that the lapse of time constitutes a good defense to this suit upon the general principles of equity above stated and which would be ad-

ministered as between two citizens litigating in this tribunal; and, *second*, that the United States is bound by the same law." Hence the real question for decision by this Court is whether the United States can be thus debarred of its right to have its interests adjudicated and its obligations to its citizens investigated and determined; or, as it is stated by Judge McCrary, "The demurrer raises for the first time in a Federal court the important question whether any lapse of time will constitute a bar or a sufficient defense to a suit in equity brought in the name of the United States."

It is a rule of law, at all times and in all jurisdictions, that the Government is not bound by any statute of limitations not imposed by itself; and that this has been and is the law in this country and of this Court is most effectually sustained by its decisions. The method by which the court below attempted to overcome and negative the whole line of decisions of this Court upon that subject from its foundation to the present time was by setting up the ground that such a suit as the present one would be barred by the statute of limitations, if brought between private individuals, and that under some circumstances lapse of time might constitute a sufficient defense, and sought to sustain this assertion by authorities of cases between individuals, *for in no case referred to is the United States a party, directly or indirectly, and in no case is the question of limitations as between the citizen and the Government* referred to even indirectly.

Having satisfied himself that lapse of time might be a sufficient defense as between individuals, Judge McCrary then holds that the United States is bound by what would be a good defense as between individuals, and that in all cases the Government is bound by the same statute of limitations as individuals, and bases this assertion on extracts from decisions, but not one of these cases involves the question of the statute of limitations or lapse of time, even as between individuals, and have no bearing whatever on the question before this Court in this case.

The authorities referred to as sustaining his position, that the Government is subject to the same defenses as the private citizen, are entirely cases of commercial paper, torts, and cases of a criminal nature, and not one case is cited where the Government's title to real estate was in question or where any equivalent interest of the Government was involved. (See decision, 4th McCrary, 12.)

But in this matter Judge McCrary has substantially overruled himself, as is shown by a subsequent case where the same question arose involving the title to land and where the statute of limitations was also pleaded by demurrer, and in which he held that "it is true, as a general proposition, that when the Government becomes a party to a suit in its own courts it stands upon the same footing with individuals and must submit to the law as it is administered between man and man, but this general rule has its limitations, and one of them is that *neither the defense of the statute of limitations nor that of laches can be pleaded against the United States.*" (See decision of Judge McCrary refusing demurrer in case of United States *v.* Southern Col. Coal & Town Co. *et al.*, 5 McCrary, 572.)

I do not find a single authority, referred to or otherwise, that can by any natural or legal construction be made to sustain the opinion of the court below in this case; but, on the contrary, the decisions of every court of every civilized country most emphatically declare the reverse, and especially do the decisions of this Court and of the district and circuit courts declare the never-before-disputed doctrine that the United States are not bound by any statute of limitations not imposed by Congress, and that laches cannot be imputed to the Government.

U. S. *v.* Kirkpatrick *et als.*, 9 Wheat., 720.
Smith *v.* U. S., 5 Peters, 292.
Burgess *v.* Gray, 16 Howard, 48.
Gibson *v.* Chouteau, 13 Wall., 92.
Gaussen *v.* U. S., 97 U. S., 584.

U. S. *v.* Thompson, 98 U. S., 486.
See opinion of Justice Story in U. S. *v.* Hoar, 2 Mason, 312.
U. S. *v.* Williams, 5 McLean, 183.
Swearingen *v.* U. S., 11 Gil. & John., 573.
U. S. *v.* Col. Coal & Town Co., 5 McCrary, 572.

In U. S. *v.* Throckmorton (98 U. S., 69), a case where suit was brought to annul title to real estate held under a title from the United States for more than twenty-four years and confirmed by the United States district court for more than twenty-two years, relief was asked for on the ground of fraud in obtaining the title. The bill was demurred to and, among other objections, the statute of limitations was set up, with the plea that the suit was not authorized by the Attorney General, the bill being signed by the district attorney.

Justice Miller, in rendering the decision of this Court, said "that it is true that the United States is not bound by the statute of limitations as an individual would be."

The reasoning in the Throckmorton case goes to confirm the position of the appellant in the case now before the Court, as this case was directly and specifically brought by the Attorney General. Its subject-matter, so far as the rights of the appellant are concerned, has never been considered by any judicial tribunal.

In U. S. *v.* Nashville & C. R'y Co. (118 U. S., 125) Justice Gray said that the United States "are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

"A statute of limitations of a State relating to the time of bringing *suits in equity has no application in the Federal courts.*"

Hall *v.* Patrick, 3 Sawyer, 506.
Manning *v.* Hayden, 5 Sawyer, 360.

In Stevens *v.* Sharp (6 Sawyer, 113), a case where the title to lands was involved and the bill demurred to on the ground

of lapse of time (as the statute of Oregon provided that no suit in equity shall be maintained to affect a land patent after five years from date), the demurrer was overruled on the ground "that a State statute of limitations is not applicable to the national courts in a suit *in equity*."

The supreme court of the State of Arkansas, the State where this suit was instituted, in McNamee *v.* U. S. (11 Ark., 148), held "that the statute of limitations is not binding upon the rights of the United States."

"The statute runs against all claims except those which are sought to be enforced by the Government in its name and on its behalf."

Miller *v.* State, 38 Ala., 600.
U. S. *v.* Buford, 3 Peters, 12.
Lindsey *v.* Miller's Lessee, 6 Peters, 666.
Field *et als. v.* U. S., 9 Peters, 182.
Bank *v.* Dearing, 91 U. S., 34.

It being shown most conclusively that the statute of limitations cannot be pleaded against the United States when it appears as a party of record in any suit in its own courts, the question comes as to the correctness of the decision of Judge McCrary—that mere lapse of time is a sufficient defense against the claims of the Government.

Not a single authority in point has been cited to sustain his theory and none are known to me, but whether the mere fact of lapse of time is a good defense in this or any other case where the United States are a party depends upon the circumstances of each case. It is a question of evidence, a matter of fact, and not a question of law, and whether the lapse of time in this case is a defense against the Government can only be determined by the evidence to be given and a final decision of the case on its merits.

As a matter of law, it is claimed that the parties who acquired ownership of the lands covered by the bill before the court lost their rights through laches. The facts upon this

subject are not difficult to obtain or hard to comprehend. They are as follows: Nathaniel Philbrook died in Little Rock, Ark., in 1820 seized of an undivided half interest in the lands covered by the bill. He died intestate, and his father, Eliphalet Philbrook, an aged gentleman, residing in New Hampshire, was his sole heir-at-law (pages 3, 41, and 57). He instructed one Woodruff, who had been appointed administrator of the estate of the said Nathaniel Philbrook, to settle the same and remit him the balance, and, upon the advice of the said Woodruff not to sell the lands, he was instructed to care for them (pages 41 and 58). In 1828 the said Eliphalet Philbrook died testate. Among his devisees were several minors; at least one only fourteen years of age. One of the devisees, T. H. Ellison, having become of age, visited Little Rock, in 1840, to claim his rights. The administrator, Woodruff, whom he supposed was caring for the property as his agent, attempted to deceive him and claimed there was nothing due him. He consulted attorneys, and under their advice returned East and secured authority to legally represent the other devisees. He then returned to Little Rock, and was soon after warned to leave the town, under penalty of death. He did not go, and soon after was assassinated and supposed to have been killed. He was severely injured, and for years was unable to reattempt to regain his property rights (pages 48, 49, 58, and 59). His fate deterred the other devisees from active endeavors to secure possession of their vested rights. Just prior to this time the Governor of Arkansas called the attention of the Legislature, by message, to the unsatisfactory title upon which the State held the State-House Square. The Legislature referred the matter to an appropriate committee, and that committee by its report distinctly recognized the Philbrook title, and held it to be valid (pages 45, 46, and 47). Therefore it is fair to presume that there had been up to that time no asserted laches.

Soon after this report, as has been stated, Ellison was on the ground endeavoring to take possession of the lands in question. The almost successful assassination disposed of him for several years and prevented the other devisees from making like attempts; hence the delay. Will any just court assert that they are blamable for delay under such circumstances, or that inaction then destroyed their legal rights?

Then the civil war intervened and a long period of reconstruction. Certainly no laches can rightfully be imputed to them during that period. Relying upon the hope that the war had opened the courts at Little Rock to him, Ellison visited that city as early as 1870 (page 51), but was advised that it was not safe for him to proceed. He returned home without action there, and through his attorney sought patents from the General Land Office to the said lands. From that time until the present suit was instituted the case of the Philbrook heirs was continually before the Executive Departments. It required much labor and great patience to secure the commencement of the present suit. The record shows (pages 8, 9, 11, 13, 15, 16, 17, 18, 19, 21, 37, and 39) the very strenuous and not wholly honorable efforts made to thwart the attempt of the United States to secure an adjudication of the points involved in the present suit, and that some of those representing the United States have been made the objects of vituperation and insult by the counsel for the appellees. Such being the fact in these late years, can it be doubted that force would have been used in prior years to any extent necessary to maintain continued possession of the lands in question? That being so, can laches, as a matter of fact, be rightfully imputed to any individuals claiming rights under the said New Madrid certificates?

It is submitted that the question of deciding whether lapse of time should govern in this case cannot properly be decided upon demurrer, but that it is a matter of fact to be determined as any other fact, after a full hearing and due

consideration. Were it otherwise the rights of the Government could be defeated in hundreds of just cases upon demurrer by simply pleading lapse of time, thus preventing examination into the merits of the case.

The lands in question were legally segregated from the public domain before the location of the same under the acts of May 29, 1830, and of July 14, 1832. Hence those locations were contrary to those statutes, as the law (4 Stat., 421, sec. 4) explicitly states: "Nor shall the right of preemption contemplated by this act extend to any land which is reserved from sale by act of Congress or by order of the President, *or which has been appropriated for any purpose whatever.*" As has been stated, at the time of the pretended preemption the land was occupied by farms, dwellings, State, county, and city buildings, had hundreds of inhabitants, and was the capital of a State, and yet it was attempted to pre-empt it as so much waste or unappropriated land!

The entire alleged pre-emption was illegal and void, irrespective of any rights which opposing claimants may have.

The facts alleged in the bill and petition need not be restated nor the numerous authorities upon which the case principally rests. If every element of fraud in this case were eliminated the incontrovertible fact remains, as reported by the Land Office and the Interior Department, that the land had been located and surveyed upon New Madrid certificates and was no longer a part and parcel of the public domain.

The United States issued its New Madrid scrip upon the condition that when it had been legally located under a proper survey and returned to the Land Office it became the solemn bond of the Government that it would convey the land to no one else, and that the same should sacredly be held in trust to the use of such locators who should thereafter be entitled to a patent on demand.

In other words, a legal segregation of so much land under the law was placed upon the records of the Land Office of

the United States and became thereby under the law and records notice to the whole world.

This has been so often decided that it has become common knowledge.

In Witherspoon *v.* Duncan (4 Wall., 218) Justice Davis said:

"In no just sense can lands be said to be public lands after they have been entered at the land office and certificates of entry obtained. If public lands before the entry, after it they are private property; a second sale, if the first was authorized, confers no right upon the buyer and is a void act."

In the Hot Springs Cases (92 U. S., 713) Justice Bradley said:

"The act tells us that the surveyor must return the survey and plat, and the notice as to the party for whom the survey was made, to the office of the recorder of land titles, to be by him filed and recorded. Then, and not till then, the applicant was entitled to a patent—the land first became appropriated. It then first appeared on the records of the country as his.

"*This point has been repeatedly adjudged by this Court and has become part of the established land law of the country, and we should do a great wrong at this late day to shake it.*"

In Stark *v.* Starrs (6 Wall., 402) Justice Field, in delivering the opinion of the Court, said:

"The right to a patent once vested is equivalent, as respects the Government dealing with the public land, to a patent issued. When issued, the patent, so far as may be necessary to cut off intervening claimants, relates back to the inception of the right of the patentee."

When lands are thus segregated to the use of a person the Land Office has no more right to bargain or convey it to others than it has to convey lands already patented; one, in law, is just as illegal as the other.

In Best *v.* Polk (18 Wall., 112) the Court held that—

"A patent (as often decided before) is void which attempts to convey lands previously granted, reserved from sale, or appropriated."

When the United States gives its obligation to deliver a patent to the first locator upon the land that right to the patent as between him and the United States is as valid as the patent itself. All authority of the United States in regard to that land, except to fulfill its obligation by issuing its patent therefor, has been exhausted and any subsequent contracts or patents to third parties are nullities.

When the locator under the New Madrid certificates did all that the law required him to do to secure his patent he had the right to suppose that the Government would issue its patent, record it among its archives, or hold it ready, according to its general usage, to be delivered to the locator or his heirs and legal representatives, as thousands are now held in the offices of the Government awaiting their owners.

In Wirth *v.* Branson (98 U. S., 121) Justice Bradley said:

"A person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location.

"The public faith has become pledged to him, and any subsequent grant of the same land is void unless the first location or entry be vacated and set aside."

If the Government negligently failed to do this in accordance with its obligation, but carelessly made a patent to some one else, it is in common honesty, as well as in law, bound to undo its error and put itself in position where it may fulfill its prior obligation.

In Hughes *v.* United States (4 Wall., 236) Justice Field, in delivering the opinion of the Court, said:

"Whether regarded in that aspect or as a void instrument, issued without authority, it *prima facie* passed the

title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress."

This obligation is just as strong as its obligation to pay its bonds for money. Its standard of honor and integrity can be no lower in one case than in the other.

The Government has once received a consideration for this land, has given its bond therefor, and the formalities of the law on the part of the locator have been complied with; and now the Executive Departments, that without authority of law violated this obligation, have honorably admitted the fact, despite the clamor of a town, and the late Attorney General has sought to do his duty in the premises notwithstanding abuse and calumniation; it is presumed that this Court will regard the honor of the country rather than the clamors of the populace, however numerous or respectable; for this Court, no less than the Executive, will consider what the law requires rather than the wishes of those who are affected thereby. Justice, not interest, governs equity.

Respectfully submitted.

HENRY M. BAKER,
Attorney for Appellant.

127-338
121-338

IN THE

Supreme Court of the United States.

October Term 1887. No. 180.

THE UNITED STATES, by B. H. BREWSTER, ATTORNEY-GENERAL, Appellant,

vs.

CHARLES W. BEEBE et al.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR APPELLEES.

The History of the Case.

U. M. ROSE,
S. A. WILLIAMS,
Attorneys for Appellees.

Press of Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1887.

THE UNITED STATES, by B. H. BREWSTER, ATTORNEY-GENERAL, Appellant,
vs.
CHARLES W. BEEBE ET AL. } No. 180.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Brief for Appellees.

THE HISTORY OF THE CASE

is almost as curious as the case itself.

On the 7th of June, 1882, Mr. Brewster, Attorney-General, wrote to Charles C. Waters, U. S. District Attorney at Little Rock, saying that he enclosed printed copies of papers in a case presented by attorneys for George V. Dietrich, Jabez V. Hunt, and John F. Calder, trustees for the heirs of Nathaniel Philbrook, deceased.

He then adds:

"The petitioners ask that suit be instituted by the United States to set aside the patent or patents for the lands described, and for proper relief in the premises.

"You will carefully examine the case as it appears upon

these papers, in connection with any other evidence you may be able to obtain from records [of] the county where the lands lie, or from the Land Office.

"And if upon such examination you are satisfied that the said patents were illegally and wrongfully issued, you will, when a bill in equity is presented to you by the attorneys for said parties, the purpose of which is the cancellation of said patents, (if you see no objection to the form of said bill,) sign my name thereto as Attorney-General of the United States, and file the same in the proper Court: *Provided, however, That the said petitioners or their counsel file a bond satisfactory to yourself indemnifying the United States against all costs in the case.*

"*After suit is commenced, the counsel for petitioners will have the conduct and management of the case, subject to a general supervision by yourself,* TO THE END THAT THE INTERESTS OF THE UNITED STATES MAY SUFFER NO DETRIMENT OR BE ABUSED.

"*The bill should be drawn in the name of the Attorney-General on behalf of the United States.*"

This communication is signed simply and ingenuously, "Brewster, Attorney-General." The last remark quoted above was probably an error into which he innocently fell. (*Ego et rex meus.*) It was, however, not acted upon.

It would seem not to have been quite in vain that the District Attorney was requested to see that the interests of the United States should "suffer no detriment or be abused;" for it turned out that the United States had purchased a part of the lands from the patentees, or their vendees, and had built a post-office and Federal court buildings thereon. So that the United States was as much interested in defeating the suit as the defendants themselves. Here was a dilemma; but, fortunately for the exemplification of legal principles, the difficulty, oppressive as it might seem to be to common minds, did not prove to be insuperable.

On the 25th day of October, 1882, counsel for plaintiffs in the Court below addressed to the Attorney-General a letter, which we endeavor to transcribe literally, as follows:

"The District Attorney has discovered *what he did not know before, viz.*, that a portion of the land in question has been purchased by the United States, and is now occupied by them. *This fact we did not know before.* The question arises, Will the Government be willing to submit to the legal adjudication of the title of the lands occupied by them, or shall the bill not yet filed be so framed as to exempt all lands now claimed by the United States Gov't? *Had we been cognizant of the Government occupying*, we should have *exempted* such lands then occupied; and as the matter stands, we are anxious to conform to the judgment and wishes of the Department of Justice, and are willing either to have the rights of the Gov't tested equally with those of private individuals, or to except the lands owned or occupied by the Gov't in our bill. We would most respectfully request the District Attorney—Waters—be instructed what course to pursue."

The situation was singular, and was not free from embarrassment.

The plaintiffs were proposing to sue for certain lands, and, after the bill had been prepared, they suddenly and unexpectedly discover that the Federal buildings in Little Rock, erected by the aid of liberal congressional appropriations, were a part of the property the title of which they proposed to invalidate by the aid of the Government, which was thus to be despoiled in common with others.

The fact that the claimants had never known that a costly structure, built by the United States at a great expense, intended to defy all the ravages of time, had been put upon the land, until after they had prepared a bill, need not be dwelt upon. Indeed, whatever singularity this feature of the case may disclose is entirely eclipsed by other parts of the same proceeding.

The offer of the plaintiffs was in the disjunctive. The United States might take pot-luck with the defendants. If it had no title, let the Court say so, and let the post-office go. But there was a latent difficulty about this proposal which an astute mind could not fail to see. How

could the United States appear on the record practically as both plaintiff and defendant? How could the Attorney-General authorize the bringing of a suit the effect of which, as claimed, would be to transfer to private parties the public property of the Federal Government?

On the other hand, if the offer of the plaintiffs to "exempt" the lands of the United States, and to proceed against less powerful parties, was accepted and acted upon, the "exemption" would seem to be not a little invidious. The proceedings in that case would appear to be the result of a combination to despoil those whose rights could not be held to be inferior to those of the nominal plaintiff whose lands had been thus exempted. Conceding the facts to be as stated in the contemplated bill, there would also be a semblance of the sale of the name of the United States for the purposes of the litigation, the probable consideration being some kind of a promise on the part of the claimants to convey their title to the lands held by the Government; of which more presently.

In the meantime Mr. Waters, the District Attorney, had made his report as to the propriety of bringing the suit. (Tr., 18.) It is addressed to the Attorney-General, and bears date December 15, 1882. The District Attorney did not advise the bringing of the suit. His opinion was that the United States could not undertake such a proceeding to settle a controversy about a title between private citizens, they having an ample remedy of their own. Even conceding the power of the Government to bring a suit of the character proposed, he did not think that a proper case for its exercise had been presented. He said:

"The claim of the Philbrook heirs covers upwards of one-fourth of the present city of Little Rock in its most populous quarter. Real estate men inform me that the valuation of the lands affected is about $1,000,000. [This, of course, exclusive of the Federal buildings not assessed, and very low at that.] The lands are not held by a few men, but are distributed among hundreds of persons, who

occupy them as their homes. The patents sought to be cancelled were issued in 1838, 1839, and 1840. Since then, until a comparatively recent date, no attempt has been made by the Philbrook heirs to assert their claim. The present owners of these lands and their grantors and their ancestors have held them for forty years—more than a generation—supposing their title to be valid. Some of the issues of fact to be sprung if this litigation is opened are now difficult—probably impossible—of exact ascertainment, as material witnesses to the controversy are dead; so that a great calamity would befall the innocent if this suit should be pressed; and incidentally, no matter what the final outcome of the suit may be, a misfortune of almost equal gravity is suffered. * * * If in your opinion I am wrong, I shall cheerfully and earnestly endeavor to carry out any instructions you may give in the premises."

On the 25th day of October, 1882, the Attorney-General writes to the District Attorney as follows:

"Your letter of the 16th inst. relating to the claim of the heirs of Nathaniel Philbrook is received.

"As touching point stated by you, to wit, that the bill as drawn includes land occupied by the United States, and upon which the Gov't has erected public buildings for a post-office, &c., the attorneys for the Philbrook estate have addressed to this Department a letter, bearing date the 21st inst., submitting certain propositions. I inclose a copy of said letter. I think it advisable, and you are hereby instructed, to amend the bill which has been presented to you, so as to strike out from the claim of the trustees all lands occupied by the United States for any purpose, and all lands which the United States claims under any title besides that stated in the bill. After you have so amended the bill it may be filed.

"*Hereafter, all persons interested in the Philbrook estate will be required to give a deed of quit-claim and release to the Gov't for all the lands in the occupation of the Gov't. This they offer to do through their attorneys in Washington. Of course they will do it, (!) for otherwise you will be instructed to dismiss the proceedings.*"

How attorneys by writing a letter could bind their clients to convey their lands, is not suggested. No such

conveyance appears to have ever been made. The whole proceeding displays a freedom from conventionality which carries one at least as far back as the days of Orestes and Pylades.

But if the claimants were really entitled to have the use of the name of the United States for the assertion of their title, it would seem hard that they should be thus forced to convey away a part of their property in order to secure the right to sue for the rest of it. Justice ought to be freely administered, without price. The *Magna Charta* so declares.

We shall see, however, that, if the heirs of Philbrook had conveyed their interest in the lands to the United States, the difficulty would not have been ended; for they only claimed an undivided half of them, the remaining half belonging, as they asserted, to the heirs of Ashley; who, in the event of the cancellation of the patents as prayed by the bill, would come in as the owners of one-half of the public lands and buildings of the United States.

The suit, as finally resolved upon, is brought to divest the title of the United States to one-half of its property; and yet it is brought in the name of the United States. What would be thought of a private individual who should bring a suit to cancel his own title?

The Bill

was filed January 31, 1883. It is brought by the United States, by her Attorney-General, against the heirs of Roswell Beebe, and it makes, in a very general and formless way, the following charges: That New Madrid certificates were issued—No. 8, to Francis Lesieur; No. 15, to Peter Poirier; No. 264, to Eloy Dejarlois—each for 160 acres of land; and No. 156, to Henry Cockerham, for 640 acres of land. These were located in 1819 and 1820, and the lands were duly surveyed by the United States surveyor, and the survey was returned to the recorder of land titles at

St. Louis October 17, 1820. The certificates of surveys 8, 15, 264, respectively, were numbered 2512, 2493, and 2471. The return of the survey of lands located with certificate 156 was, as the plaintiff avers and believes, made also on the same day; but, for some reason, the lands were included in a resurvey numbered 2489, which was returned May 2, 1839. All of these lands remained in the open possession of the holders of the certificates until they were disseized. After these locations were made, the lands in Arkansas were surveyed into townships, ranges, and sections, by which the lands above referred to were thenceforth to be known as all of section 3, N. ½ of section 10, 96 acres off the west side of frl. section 2, and 66 acres off the west side of the N. W. ¼ of section 11—all in township 1 N., range 12 W. All of these lands were afterwards conveyed to W. M. O'Hara, and after that to Nathaniel Philbrook and Chester Ashley equally. On the 10th day of September, 1875, the recorder of land titles at St. Louis issued his patent certificates 513, 514, and 515 to the original locators and their legal representatives. Down to 1838–'9 these titles were considered good; and the town of Little Rock was laid out and built on the lands in question. The devisees and heirs of Philbrook have conveyed their half interest in the lands to certain persons named Dietrich, Hunt, and Calder, in trust, to procure patents from the United States. The lands were wrongfully patented to other claimants under pretense that they had valid pre-emptions, as follows: One tract to the State of Arkansas, date not given; one tract to McLain & Badgett, June 19, 1840. Samuel Plummer entered one tract June 6, 1838, and on the same day George Harris, Jackson Crain, and Joel Crain entered other tracts. Mary Louisa Imbeau entered another tract June 7, 1838. These parties assigned to Roswell Beebe, and a patent was issued to him September 25, 1839. Another tract was entered by Baptiste Bonne, June 7, 1838, and a patent was issued to Beebe, as his

assignee, October 30, 1838. At the time of these entries the lands were covered by the New Madrid locations, and hundred of settlers were living on them, claiming under them. In order to get his patents, Beebe "coerced the register to believe" that he had procured the consent of the settlers to its issue, which was not true. He also falsely pretended that the entries were made in the interest of the New Madrid claimants. Beebe also "entered into a so-called bond to convey to the original holders and claimants of said lands the title he should acquire by the issuance of said patents on said floats, which he afterwards fraudulently failed and refused so to do; all of which was a fraud upon the United States and the other claimants to and settlers upon said lands." The bill further alleges "that said locations of said floats and the issue of said Beebe patents were allowed under a misconception of the law procured by undue means, and the same are null and void, and ought in equity and good conscience to be cancelled." The prayer is, "that said certificates and patents so unlawfully issued to said Roswell Beebe be cancelled, set aside, held for naught, and ordered to be surrendered, excepting any lands owned or occupied by the United States for any purpose, and all lands which the United States claims under any title besides that stated in the bill, and particularly the south half of block 98, city of Little Rock, upon which the U. S. court-house and post-office is situated; and that said defendants, and all others who may appear or intervene in this suit, be divested of all title or claim, arising under said Beebe patents, to the lands embraced therein, and be vested in your orator, and for all other proper relief, as if specifically prayed."

To the bill is appended the name of the Attorney-General, signed by the District Attorney, as per letter of instructions annexed, and the names of two or three other counsel, one of whom swears to it in the common form, when an oath is required.

SUBSEQUENT PROCEEDINGS.

Defendants Joseph W. Martin and wife demurred on the following grounds:

"1. It appears from the face of said bill that the plaintiff has no equity to maintain this suit.

"2. It also appears that the plaintiff has no interest in the prosecution of this suit, and that if it has any interest in the subject-matter of this suit, it is one in common with that of the defendants named therein.

"3. It appears from the face of the bill that the claim sued upon is stale, and such as a court of equity will not enforce.

"4. It appears that there are many persons who live on the lands described in the bill who are not made defendants thereto." (Tr., 24.)

The demurrer was sustained, (p. 40,) and plaintiffs had leave to amend.

Some other pleadings may be noticed, though perhaps not important.

Defendant Ratcliffe, as administrator of Faust, pleaded the statute of limitations.

Defendant Kate Faust moved to dismiss because the claim was a stale one, and because it did not appear that the suit was prosecuted by the Attorney-General of the United States.

Under the leave to amend, a paper was filed called "Amendment to Bill." (*Tr.*, 40.) It was sworn to by one of the counsel, who in his affidavit states that "the claimant, the United States, is mentally incompetent of taking an oath." We were aware that the precise outlines of Federal power had been the subject-matter of discussion; but the mental capacity of the Government for making an oath involves a question that had probably not been previously raised. It is well to have it finally settled by an affidavit.

No mere summary could do justice to this amendment.

It needs to be read and taken in as a whole. Along with it was filed a paper that is called a "reply" (!) to the plea of the statute of limitation. Neither of these papers is signed either by the Attorney-General, or by the District Attorney; and they form properly no part of the record.

It is clear from the reading of them that the writer, or rather writers—for we cannot suppose either of them to be the creation of a single mind—conceived that the difficulty in their case was laches. They therefore say that Nathaniel Philbrook was murdered in 1824. It is not stated that he was killed because he had a part of a New Madrid claim on some lands adjoining Little Rock, then an insignificant hamlet in an almost unbroken wilderness; so that the manner of his death, if true as stated, would not seem to be material. It is also stated that in the winter of 1840–'41, one Ellison, an heir of Philbrook, went to Little Rock to look after his interests, but found that his business did not make him popular. He received several threatening letters; and one day he went hunting with a young man, whose name is not given, and was shot in the groin, by whom he does not know. It is difficult to say what were the ideas intended to be conveyed by these papers. Possibly it may have been that by reason of mob violence the Courts in Arkansas were practically closed to the Philbrook heirs for a period of about sixty years. A reference to the files of this Court showing the protracted litigation concerning the original entries of the lands on which Little Rock is built—Cunningham *v.* Ashley, 14 How., 377, Beebe *v.* Russell, 19 *Id.*, 283, Hooper *v.* Scheimer, 23 *Id.*, 235, Lytle *v.* Arkansas, 9 *Id.*, 314, Lytle *v.* Arkansas, 22 *Id.*, 202, Rector *v.* Ashley, 6 Wall., 142, and other cases—would seem to indicate that the Courts were performing their usual functions. But these papers fail to show how it was that the inhabitants so angrily and obstinately persisted in buying from Beebe, when probably they might have bought from the heirs of

Philbrook, who had the better title. Perhaps that action on their part may be laid to the charge of the innate depravity and folly of the human race, and the general crookedness of early settlers. Neither do any of these papers show why it was that the claimants never applied to the recorder of land titles for patent certificates until the year 1875; nor by what methods they procured one Stillman O'Fish, recorder of land titles in St. Louis, to certify that they were entitled to have patents for the lands in question, when they had already been patented for more than thirty-seven years.

These papers introduced no new legal element into the case. If they had plainly asserted that they did not sue on account of local prejudice and hostility, that statement would not have changed the law, as was said in Rees *v.* City of Watertown, 19 Wall, 107. This amendment went out on demurrer.

The opinion of the Court below, by McCrary, Circuit Judge, will be found in the 17th volume of the Federal Reporter, p. 36. It must be clear to any one possessed of the simplest elements of legal intuition that the present ghastly attempt at a suit could not be maintained; but to ascertain the reasons for that conclusion, it becomes necessary to examine the authorities.

BRIEF.

First proposition—It did not appear that the suit was prosecuted by the Attorney-General.

As we understand the law on this subject, in order to support a proceeding by the Attorney-General for the cancellation of a patent, it must be made to appear that he is prosecuting it *bona fide* in his own name as such; and that it is not sufficient if it appears that he has merely lent his name and that of the Government to private parties to subserve private ends.

The present case is singularly like that of the *United States* v. *Flint*, 4 *Sawyer*, 83, even down to the requirement of the Attorney-General that the claimants shall give bond to save the United States harmless in respect of costs; the principal difference being, that this suit is brought to invalidate the title of the Government itself to valuable property, which was not the case in United States *v.* Flint. In that case Hoffman, J., said:

"It is objected that the bill is unsworn. If, however, the suit is properly brought in the name and by the authority of the United States, verification of the bill is unnecessary. But it may be observed that if the Attorney-General has thought it his duty to authorize these proceedings, it would have been more satisfactory to the Court if the allegations of these unsworn bills had been authenticated by his own signature, affixed to them under the sanction of his personal and official character, and not merely by those of the District Attorney, whom he has ordered to bring the suit, and of the special counsel to whom he has delegated his authority. An assurance would thus have been afforded of the Attorney-General's belief in the allegations in the bills, and in the existence of rights on the part of the United States, which the bills seek to enforce; that the suits are *really*, and not merely nominally, brought by the United States *to protect its rights*, and not merely *to promote the interests of private individuals or corporations; an assurance somewhat weakened by the circumstance that the Attorney-General seems to have considered the rights of the United States so doubtful, or its interests so unimportant, that he has directed the District Attorney to commence these suits, on the giving, by the said John B. Howard, security for, or depositing a sufficient sum to defray all expenses which may be incurred in said legal proceedings.* Bonds have accordingly been given by John B. Howard. The lands covered by the grants in these cases are many thousand acres in extent. The bill prays that they may be adjudged to be public lands of the United States. *It is not to be supposed that if the Attorney-General were persuaded that so large and valuable a property belonged to the United States, he would have made the assertion of its rights to depend upon the willingness or ability of private individuals to defray the expense of the litigation.*"

In that case Judge Hoffman further said:

"The counsel for the United States has drawn a vivid picture of the avowed forger glorifying in his crime, defying the justice he has duped, and demanding that the officers of the Government shall, by issuing to him his patent, assist him in consummating his fraud.

"In discussing a dry question of jurisdiction, such appeals are, perhaps, not quite appropriate. But if the practical bearings of the questions to be decided are fit subjects for consideration, it may be observed that the question is not whether an admitted forger shall be allowed to enjoy the fruits of his crime—for the demurrer admits the truth of the allegations of the bill only hypothetically, and for the purposes of the argument—but whether every title in this State derived from the former Governments shall be subjected to the ordeal of a new litigation, whenever the Attorney-General, or those who may obtain his ear by, it may be, false or interested representation, sees fit to allege in an unsworn bill that the documentary evidence on which the title rests is forged or antedated.

"If, without the authority of Congress, and on such representations, a cloud can be cast upon titles in this State, the effect would be little short of a public calamity. The repose of ancient possessions would be disturbed, and the security of titles, long since, and after protracted litigation, adjudged to be valid, would be menaced. A tremendous weapon of vexation, oppression, or extortion might be placed in the hands of unscrupulous persons, and the horde of professional witnesses which has so long infested the Courts in this class of cases might resume their trade, and again find a market for their venal testimony.

"Compared with evils such as these, the public benefits to be derived from the exposure of a few frauds which may have eluded the vigilance of the Court or officers of the Government would be insignificant.

"The force of the objections is not diminished by the consideration that, from the necessities of his position, the Attorney-General is unable personally to examine into the merits of every suit that is brought, and that he is forced to delegate the authority to use the name of the United States, in form, to the District Attorney, but in fact to special counsel, who, in the cases at bar, has given bonds to pay the expenses of litigation, and who may smite or

spare or threaten any title in this State, at his discretion; or, assuming him to be actuated by the highest motives, according to the conclusion he may on investigation reach, as to the propriety of the final decree of the Board, the District or Supreme Courts, adjudging the title to be genuine. If this power should by chance fall into unworthy hands, it might afford the opportunity for enormous abuses."

In the same case Mr. Justice Field used the following language:

"If the Attorney-General, by virtue of his office, possesses any such extraordinary power as claimed in the case, to disregard the action of his predecessor, and to renew litigation at his pleasure respecting the titles of a whole people, upon a suggestion that false testimony may have been used in the original proceedings, the security which the holders of patents from the Government issued upon such decrees have hitherto felt in their possessions is unfounded and delusive. We must have further evidence than is presented to us before we can admit the existence of a power so liable to abuse, and so dangerous to the peace of the community."

The case of *United States* v. *Flint* came to this Court and is reported under the title United States *v.* Throckmorton, 98 U. S., 70, and the decree below was affirmed. The Court held that it did not sufficiently appear that the suit was prosecuted by the Attorney-General of the United States; and that a mere direction of that officer to the District Attorney to permit a suit to be brought in the name of the Government, to support merely the interests of private persons, upon their giving bond as indicated, upon which the Attorney-General would wash his hands of the whole transaction, did not make it a suit of the United States.

Mr. Justice Miller said:

"In the class of cases to which this belongs, however, the practice of the English and American Courts has been to require the name of the Attorney-General as indorsing

the suit before it will be entertained. The reason of this is obvious; namely, that in so important a matter as impeaching the grants of the Government under its seal, its highest law officer should be consulted, and should give the support and authority of his name and authority to the suit. He should also have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill. * * * It is not in this way that the then Attorney-General should have placed himself on the record as responsible for such a bill. In confirmation of this view, it does not appear that he or his successors have ever given the slightest attention to the case. In the argument of it before us no officer of the Government appeared. It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patents from the Government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the Government for costs, *and furnishing the needed stimulus* to a District Attorney, institute a suit in chancery in the United States Court to declare the patent void. It is essential, therefore, to such a suit that, without special regard to form, but in some way which the Court can recognize, it should appear that the Attorney-General has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause."

Second Proposition—The Attorney-General has no right to file a bill for the purpose of annulling a patent in a case like the present, where neither the Government nor the public have any interest in procuring the decree that is sought for.

The question that arises upon this branch of the inquiry is an important one, and one that imperatively demands an authoritative solution that this Court alone can render. This is not the first suit of the kind that has emanated from the Department of Justice, though it is the most flagrant.

For years past that Department has been besieged for the loan of the name of the Government for the prosecution of purely private suits, by parties who could have had any redress they may have been entitled to by suing in their own names. When the Attorney-General has lent the name of the Government to one man, or to a combination of men, he finds it difficult to refuse others. The advantages which the applicants expect to reap are by no means illusory. They think that a suit brought by the Government will receive more respectful attention from the Courts than it would if brought in their own names. By this method they manage also to sink their individuality out of sight; which in some cases is not undesirable. When a suit is brought in the name of the Government the *lis pendens* will affect titles that are assailed thereby more seriously than if a like suit were brought by a private individual; because the Government is supposed to have practically unlimited resources, and to have the best talent of the country in its service. It is not astonishing that, under these circumstances, men having no knowledge of legal principles should be dismayed on finding themselves confronted by such a powerful adversary, and that they should consent to buy their peace, which ought never to have been invaded. It is well known, too, that the approval of a proceeding by the highest law officer of the Government, however obtained, or however unwisely granted, communicates to it a degree of importance which otherwise it would not possess. Aside from that circumstance, the present suit never could have had any importance whatever. Even the counsel for the defense in cases of this sort labor under some disadvantages; for, though the fallibility of men in high places has been proved by at least six thousand years of human experience, yet it is expected that counsel will not criticise their language and conduct with the same frankness and freedom that are displayed without complaint every day in the trial of causes

between private suitors. A strange evidence of that fact appears in a singular affidavit filed here, on motion to dismiss, by one of the counsel for the plaintiff in the Court below, in reference to a brief filed for defendants in that Court; in which affidavit it is said that "Attorney-General Brewster took the said brief as a personal insult, and appealed to one or more of the Supreme Justices for redress;" and he asserts that the concluding paragraph of Judge McCrary's opinion was intended as a rebuke to counsel for their temerity in criticising the acts of the Attorney-General.

And yet in that brief there was not the slightest impeachment of the integrity of the Attorney-General, though it was gently intimated in various places that his conduct in the present proceeding was neither wise nor well considered; and this with a degree of mildness and forbearance that under all the circumstances was hardly less than angelic. The substance of all that was said in that brief will be contained in this. The matter is not of the slightest earthly importance, except as illustrating the fact that private suitors who procure the loan of the name and prestige of the Government do thereby acquire certain advantages which otherwise they would not have.

Another benefit which such litigants often expect to acquire by hiding themselves behind the name of the United States is, that they will thereby remove the bar of the statute of limitations, and that the doctrine of laches will not be so strictly applied as in the case of a private party. Whether this is true or not, the assertion of the well-known maxim, that no time runs against the Government, tends to induce defendants to submit to compromises which they otherwise would not make.

In another aspect of the case, suits of this kind are grossly oppressive and unjust.

The claimants, as required by the Attorney-General, filed a bond in the penal sum of one thousand dollars, condi-

tioned that they would "pay all costs for which *the United States* may be liable in the above-entitled suit." The defendants have been put to heavy costs, both in the Court below and in this Court; but they can have no decree for them because the United States is a party. The statute provides for the recovery of costs when the litigation concerns private parties alone. Can the Courts sanction a proceeding by which the statute is plainly evaded and made of no effect?

There is another objection that is not one of sentiment merely. It is not fit, it is not becoming, it is not decent that the august name of the Republic shall be banded about in this manner, in the interest of private parties; and if the practice is to be continued, it must sooner or later assume the complexion of a public scandal. If discontinued, private parties will lose no rights, the Department of Justice will be disincumbered of a large amount of business with which it has no legitimate connection, the public service will be improved, and private suitors will be placed on a footing of equality in the Courts of the country.

But if the practice is to be upheld, we submit, with diffidence, that it should be modified so that the Government may derive some revenue for the benefits thus conferred in giving to individual litigants peculiar advantages over their adversaries in the courts of justice. We see that in this case the claimants were willing to give a half a block of ground and a post-office for the privilege of using the name of the Government. Others, no doubt, would prefer to pay in money; and some would prefer to divide with the Government the property to be recovered in the suit. Contracts of this kind might be left to the discretion of the Attorney-General. In this way much revenue might be raised, and the present oppressive tax on whisky and tobacco might be lightened or abolished. We make these suggestions on high moral grounds as well as on financial

ones; for unearned or uncompensated gains, whether derived from a gaming-table, or the Government, or a Government official, have a demoralizing effect; and people who are able to look after their own interests ought to be allowed to do so.

We are aware that these suggestions can only be made effectual through the agency of the legislative department of the Government; but we are aware, also, that they would receive much more attention from that department if they could be presented with the distinct indorsement and sanction of this high tribunal.

No better case can ever arise for the examination of the powers of the Attorney-General, in respect of such suits, than the present. It is undeniable that the Government and the Attorney-General have no more interest in the decree sought to be obtained than they would have in a suit that might be pending in the Courts of Siam for the recovery of a white elephant. Nor does the Government hold any position of trust with regard to the land described in the bill; for it conveyed it away nearly fifty years ago. The bringing of the suit was, therefore, quite outside of any governmental function; and it is difficult to perceive how the right to bring it can be maintained, save on a theory that would make it competent for the Government to engage in the enterprise of redressing wrongs generally. If the Government may now, after the lands have been patented for nearly half a century, bring this suit, why may it not interfere in any other private matter of individual concern?

In U. S. *v.* Minor, 114 U. S., 243, the Court, by Miller, J., said:

"If, by the case as made by the bill, Spence's claim had covered all the land patented to Minor, it would present the question whether the United States could bring this suit for Spence's benefit. The Government in that case would certainly have no interest in the land recovered, as

it must go to Spence without any further compensation. And it may become a grave question in some future case of this character how far the officers of the Government can be permitted, when it has no interest in the property or subject of the litigation, to use its name to set aside a patent for which it has received full compensation for the benefit of a rival claimant."

It is plain from the later decisions of this Court that where the suit is in the interest of private parties it should be brought in their name, and not in that of the United States. In Moore *v.* Robbins, 96 U. S., 552, the Court said:

"If fraud, mistake, error, or wrong has been done, the Courts of justice present the only remedy. These Courts are as open to the United States to sue for the cancellation of the deed, or reconveyance of the land, as to individuals; *and if the Government is the party injured*, this is the proper course."

In United States *v.* Schurz, 102 U. S., 404, the Court said:

"On the other hand, when he has obtained this possession, if there be any equitable reason why, as against the Government, he should not have it—if it has been issued without authority of law, or by mistake of facts, or by fraud of the grantee—the United States can, by a bill in chancery, have a decree annulling the patent, or possibly a writ of *scire facias*. If another party (as the city of Grantsville), for any of the reasons cognizable in a court of equity, is entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession, or perhaps before."

In Silver *v.* Ladd, 7 Wall., 228, the Court, in speaking of this subject, said:

"The most usual mode under the chancery practice, unaffected by statute, is to compel the defendant in person to

convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the Court for that purpose."

In Steel *v.* St. Louis Smelting Co., 106 U. S., 454, the Court said:

"So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the Government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be brought *by him* in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way."

In the Flint case the Attorney-General, in his original bill, "waived" the right of the Government to a part of the land, the title of which was sought to be cancelled.

The Court said:

"It will surely not be claimed that the Attorney-General, or his representative, has not only the right, by instituting these proceedings, to cloud every title in this State with the menace of a litigation, but also that he can waive, at his discretion, the rights of the United States to the lands adjudged to be public lands. The power to donate the property of the nation is elsewhere vested."

On the 11th day of March, 1886, the House of Representatives of the United States referred to its Judiciary Committee, to inquire and report to the House—

"Whether under existing law, and if so, under what law, the Attorney-General has authority at the instance and in the interest of private corporations or of individuals, in the name and expense of the United States, to institute and carry on or defend against suits to cancel or annul letters-patent issued to citizens of the United States under the laws thereof, on account of inventions or discoveries, said United States having no pecuniary or other interest therein."

The Committee reported that—

"——— should a suit to cancel or annul its letters-patent be begun by the United States, and should the bill aver that the United States had no pecuniary or other interest therein, *i. e.*, in the patent, without qualifying words, it would be dismissed upon demurrer. No Court would try a cause in which the party suing appeared to have no interest. * * * Such pleadings must aver that the public interests are involved, and how."

49th Congress, 1st Session, Report No. 1003.

In that report the Committee concluded that, as a patent for an invention is a monopoly, the public are interested in having it annulled if it has been wrongfully granted, and that on that account the Attorney-General may bring a suit in the name of the United States for that purpose. Recently a contrary ruling has been made by the United States Circuit Court for the District of Massachusetts in the case of The United States *v.* The American Bell Telephone Co.; but with that question we have no concern.

There is this difference between *United States* v. *Hughes*, 11 *How.*, 568, and the one at bar: In that case the claimant was lawfully entitled to a patent when the defendant obtained one by fraud. In this case there is no pretense that the claimants had any showing upon which they could apply for a patent until the 10th day of September, 1875, when they procured patent certificates from the recorder of land titles in St. Louis.

We submit, however, that the case was not well considered. The evils that might flow from the extraordinary power claimed for the Attorney-General had not then become apparent.

Nothing was or could be gained by referring to the English cases, for the powers of the Attorney-General in England are no criterion of the powers of an Attorney-General of the United States. In the case of *The Floyd Acceptances*, 7 Wall., 676, the Court say:

"When this inquiry arises, where are we to look for the authority of the officer? The answer which at once suggests itself to one familiar with the structure of our Government, in which all power is delegated, and is defined by law, constitutional or statutory, is that to one or both of these sources we must resort in every instance. We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority."

When we look to these sources, do we find any authority conceded to the Attorney-General to bring suits in any case where the Government has no interest to protect? Obviously if any Member of Congress should at any time propose such a law he would be regarded as little better than insane.

In United States *v.* Hughes the Court said:

"Nor can it be conceived why the Government should stand on a different footing from any other proprietor."

True; but in this case the Government has long ceased to be a proprietor. It has no interest in the land, and no duty to perform in regard to it. It will hardly be pretended that the Government warrants the title to the lands it sells. Will any one pretend that if A sells and conveys lands by a quit-claim deed to B, and surrenders possession to him, he can afterwards bring a suit to cancel the deed on the ground that B fraudulently procured it to be made to him, when it ought to have been made to C? Certainly no such suit was ever heard of or will be until time shall end. In that case C would be the party injured, if any such fraud was really perpetrated, and he alone could sue. A, in a Quixotic fashion, might be willing to redress the wrongs of C; but the Courts would say that they are not kept open for amateur litigants.

Moreover, by the common law it is a crime to bring a suit where the plaintiff has no interest.

Blackstone says that "maintenance is an officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party, with money or otherwise, to prosecute or defend it. * * * The punishment by common law is fine and imprisonment, and by the statute, 32 Henry VIII, ch. 9, a forfeiture of ten pounds." (Book 4, p. 135.

"Champerty," the same author tells us, "is a species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partire* to divide the land or other matter sued for between them, if they prevail at law. * * * These pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted upon by Roman law, * * * and they were punished by the forfeiture of a third part of their goods, and perpetual infamy." (*Ib.*)

"Common barratry is the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise. The punishment of this offense in a common person is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barrator who is thus able as well as willing to do mischief ought also to be disabled from practicing in the future; and, indeed, it is enacted by statute, 12 George I, c. 29, that if any one who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practice as an attorney, solicitor, or agent in any suit, the Court, upon complaint, shall examine it in a summary way, and if proved shall direct the offender to be transported for seven years." (*Ib.*, 134.)

Can it be contended that the Attorney-General has a monopoly of a species of litigation that nowise pertains to the Government, and which is forbidden to other men?

Mowry *v.* Whitney, (14 Wall., 440,) was a case of a patent for an invention. In cases of that sort, of course, the public have some interest. But the Court limit the remedy to

that class of cases where a patent has been issued, and it is "*for the good of the public* and right and justice that it should be repealed."

In this case the interest of the public is on the side of the repose of titles long established, as conclusively shown by the statutes of limitation.

If the practice adopted in this case is to be continued, we do not see why some future traveller in America may not record something like the following:

"As an instance of the panic which reigns amongst the Ottoman authorities, I will cite one case which occurred: A telegram was received by one of the governing Pashas from his superior to destroy eleven named villages. * * * The Pasha was about to carry his orders into effect when some influential Bulgarians and Turks waited on him, and represented their horror at the intended cruelty, stating that they knew the villages intimately; that the inhabitants were most peaceful, industrious, and harmless, and did not harbor a thought of rebellion. They begged the Pasha to accompany them to the villages and satisfy himself of the accuracy of their assertion. He immediately did so, and, of course, found that the statement was correct. He telegraphed to that effect to his superior, and received orders to spare the villages; and thus these poor people escaped. Would that it had been so in all cases." (Baker's Turkey, ch. 2.)

Finally, if it be true that the United States may bring a suit to cancel a patent to land in which it has no conceivable interest, it must be admitted that the power is an anomaly, matched nowhere else in the law; that its exceptional existence is not demanded by any defect of remedy within reach of the private citizen, and that in the hands of an unwise or an unjust man it is liable to tremendous abuse. In a Government such as ours the fact that these propositions are undeniably true ought to be conclusive evidence that the power does not exist. It is at the same time useless and dangerous.

Third Proposition — The bill alleges that Beebe obtained his patent by giving a "so-called bond" to convey to the ancestor of the claimants; but this affords no ground for annulling the patent.

It is stated in the bill that Beebe "coerced the Register at Little Rock to believe" that he had acquired the consent of all the settlers on the lands to the issue of the patents, and "that these floats were located to secure the title to the holders of the New Madrid certificates," and that he "entered into a so-called bond to convey to the original holders and claimants of said lands (and the bill states that the Philbrook heirs were such holders and claimants) the title he should acquire by the issue of said patents on said floats; which he afterwards fraudulently failed and refused to do."

The last statement is equivalent to an assertion that the heirs of Philbrook had accepted the "so-called bond," and had consented to the issue of the patents, because they certainly would not complain of a refusal to comply with the conditions of the bond if they had never claimed anything under its provisions.

This view, drawn from the bill, is undoubtedly the true one; and it is confirmed by the exhibits referred to in the bill.

Of course the charge of a breach of contract on the part of Beebe furnishes no ground for cancelling the patent. In Mahn *v.* Harwood, 112 U. S., 365, the Court said that a patent "can only be avoided by a direct proceeding by way of *scire facias*, or bill in chancery, to set aside the grant *for some reason which made its original issue a wrongful act.*"

Fourth Proposition—The allegation that the lands were occupied by settlers, who did not consent to the entries upon which the patents issued, is no ground for cancelling the patents.

That is an objection that the settlers might have made; but it is not alleged that Philbrook was a settler.

Fifth Proposition—The exhibits to the bill, which are made a part of it, show conclusively that the present controversy was finally adjudicated by the land officers nearly fifty years ago.

The bill makes as exhibits the letter of the Register and Receiver at Little Rock, the opinion of James Whitcomb as Commissioner of the General Land Office, and the bond of Beebe, as showing how the entry of Beebe was procured.

The letter of the Register and Receiver is as follows:

"LAND OFFICE, LITTLE ROCK, *January* 30, 1839.

"SIR: Your letter of the 26th ultimo has been received, requiring us to report the reasons 'why entries No. 3549, 3550, 3552, and 3554 were permitted to be made on land already occupied by prior claims long since located, and against the validity of which this (your) office possesses no evidence.'

"In reply, we have to state that these entries were permitted in conjunction with 2556, upon the demand of Roswell Beebe, and the several allegations made by him, setting forth and showing conclusively that the Treasury Department had disallowed the pre-emption claims granted under the act of 1814, upon all lands south of the Arkansas, ceded by the Quapaw treaties of 1818 and 1824, including the pre-emption at this place, upon the grounds that the Indian title to these lands had not been extinguished at the passage of that law, and that the validity of these locations depended upon the same principle, and

would no doubt be governed by the same rule of decision; and at that time no one here or elsewhere, so far as we have knowledge, had ever set up any claim to these lands, excepting persons desiring conveyances from those who supposed that they rightfully held from the United States under the pre-emption act of 1814, and the New Madrid locations.

"The original plat of survey, embracing these entries, was at the time complete, and represented the subdivisional lines and the number of acres corresponding respectively with those certificates of entry, and there was no evidence of proper record on file in either of our offices to show that these lands were ever regularly entered or located, and due return made thereof according to law, except such evidence was exhibited by the pre-emption abstract from Batesville under the act of 1814, and the coloring of the plat. The capitol of the State of Arkansas is built upon a part of these lands, at a cost of $70,000 or more.

"The corporate authorities of the city of Little Rock, as well as the inhabitants, all hold under conveyances derived from or under the pre-emption claim, and against the New Madrid claims, either by a compromise made by the respective claimants about the year 1821, or by the decision of the land officers at Batesville, of which we are not particularly informed.

"All parties within the limits of the city, we believe, are fully satisfied that those entries which embraced it will cure the defects in their titles, as no dissatisfaction is known to exist with any one interested in the question. Those entries were, therefore, allowed by us upon due reflection, under the belief that we were acting correctly in the discharge of our duties, and by which the individuals who supposed they rightfully claimed these lands will be enabled to obtain a perfect title, and thereby save and protect the rights and titles of numerous persons claiming under them, and to whom they are bound by obligation or deed.

"Herewith inclosed you will receive a copy of an obligation executed for the purpose of ultimately securing the rights of persons who derived their conveyances from any of the original claimants to those several tracts of land, which has been duly recorded according to law, and will be in force from and after the emanation of the patents.

The original has been deposited in our office as a public document, for the examination of all concerned.

"We are, sir, very respectfully, your obedient servants,

"SAM. M. RUTHERFORD.
"P. T. CRUTCHFIELD.

"JAMES WHITCOMB, Esq.,
"*Commissioner of the General Land Office,*
"*Washington, D. C.*"

The "bond" referred to in the letter of the Register and Receiver was a covenant on the part of Roswell Beebe to "the mayor and aldermen of the city of Little Rock in behalf of said city, as well as in behalf of said State of Arkansas, and also in behalf of any person or persons who may have in his own right a proper and regular chain of conveyance or conveyances of any town lot or lots situated in the first original town, now city, of Little Rock, derived from, by, or under any one or more of the original owners and proprietors of the said town," reciting that Beebe had caused the lands on which the city was built "to be located and entered with pre-emption floating claims," and binding himself, if patents should be issued to him, to convey the said lots and blocks of land to the city and State, and to each of the persons claiming under any of the said original "owners and proprietors of the said town," by quit-claim deeds for the lands severally held by them.

On the fifteenth of July, 1839, the Register and Receiver again wrote to the Commissioner of the General Land Office as follows:

"We stated in our letters of the thirtieth of January last that we believed there was no dissatisfaction evinced as to the location of the floats in this town of June last year. Neither do we now know of any particular dissatisfaction on the subject, further than the very great anxiety with which every person is impressed to obtain a perfect right to the property claimed and purchased by him, and the doubt entertained by some of obtaining the same through and by the location of said floats.

"The individual who located these floats, in June of last year, entered into an obligation and covenant (a copy of which we transmitted to you with our letter of the thirtieth of January last) by which he agreed, in case the lands so located by him should be patented to him, he would convey title to all persons holding improvements on the lands so located, and deriving their conveyances from any one of the original locators or proprietors of the town, which we know was all that the settlers, occupants, and purchasers of town lots desired. * * * As the location of William Russell was suspended in your office *for nearly twenty years*, and was not officially annulled and set aside till last month, and not being able to divine what may be the final decision in relation to the other claims to the lands, which include this city, and being both of us deeply interested, as proprietors of property and town lots, we have joined a number of other citizens in appealing to Congress, by memorial, to confirm and make valid the said location of William Russell, from whom we all derive conveyances for our town property."

The petition to Congress thus referred to was signed by a large number of persons claiming to be property-holders. It recited that one Murphy and one White had claimed a pre-emption on the lands; that their pre-emption right "was conveyed to William Russell many years since;" that Russell and others had laid off the town on the lands; that the memorialists had bought lots from them in good faith, and had made extensive improvements on the lands; that many of the lots had passed through many hands in the preceding nineteen or twenty years, "under the full and confident belief that the pre-emption of the original proprietors, together with their conveyance to William Russell, was sanctioned and confirmed by the Government;" that large and valuable improvements had been made on the land, "such as a state-house, court-house, etc.;" and that "the private and public improvements will amount at this time to several millions of dollars." They had recently learned that the Murphy pre-emption had been annulled

and set aside. They were informed that Roswell Beebe had located "within the last twelve months some floating pre-emptions on the land, and that he was trying to get a patent;" they had confided in the honesty of those from whom they had bought, and had "ever believed they were safe from the intrusions of designing and artful speculators!" They respectfully represented "the distress which must inevitably ensue if the lands above described are not confirmed to the assignees of the original pre-emptors, or so arranged that the present owners and occupants of lots are not secured in the enjoyment of their rights thus obtained;" and, finally, they prayed that the original locations might in some way be confirmed.

On the twenty-eighth of August, 1839, Beebe wrote to the Commissioner of the General Land Office that the persons moving in the matter of the memorial had no lots in that part of the city for which he asked patents; that many had signed it "from improper statements made to them at the moment, or without knowing or caring anything about the matter; and that there were only twenty-seven of the signers who were property-holders."

The memorial seems to have dropped, and nothing more is heard of it, all parties apparently acquiescing in the issue of the patents to Beebe; quite a number of them, no doubt, contemplating the suits that were afterwards brought after the issue of the patents, and which were fought out with that obstinacy which carried the cases through all the Courts to which the adverse claimants could procure access.

The letter of the Commissioner of the General Land Office is dated September 18, 1839. In that letter he recites the various claims before him: "The claims of Cockerham, under the New Madrid location;" "the New Madrid claims of Peter Poirier and Eloi De Jarlois, under the law of seventeenth of February, 1815;" "pre-emption enty No. 241, in name of William Russell;" the claim of "Matthew

Cunningham, under act of twenty-sixth of May, 1824; by the same person, under act of twenty-ninth of May, 1840; same tract claimed by Christian Brumback, under act of twenty-ninth of May, 1830, and also by Gen. Pope, under act of fifteenth of June, 1832, and also by Elizabeth Bacchus, under act of twenty-second of June, 1838;" claim of "William Cummins, under act of nineteenth of June, 1834;" claim of "Richard C. Byrd and Nicholas Peay, under act of nineteenth of June, 1834, and the floats Nos. 3,549, 3,550, 3,552, and 3,554, certificates for which have been issued at Little Rock." The Commissioner then states that several of the claims have already been "disposed of, and the only claims to be examined are the *New Madrid locations*, the claims under the act of 1830, of Brumback and Cunningham, that of Gov. Pope, under the act of fifteenth of June, 1832, and the floats under the act of nineteenth of June, 1834."

This letter, which is addressed to the Hon. Levi Woodbury, Secretary of the Treasury, concludes as follows:

"Nothing, then, appears to prevent the confirmation of the floats but the want of a compliance with the directions in the circular from this office, dated October 10, 1837, requiring the written consent of those upon improved lands to be filed when such land was applied for. *As these floats were located to secure the title to the holders of the New Madrid locations*, and the pre-emption claims under the act of 1814, from whom conveyances to individuals to all the town property are said to be derived, and as the floating claimant has entered into bond for the conveyance to them of all the title he shall acquire by issuing a patent on these floats, it is respectfully submitted whether the spirit of that circular has not been complied with by the filing of that bond, particularly as no objection has been made except by those claiming part of the same land by pre-emption, and as numerous letters from alleged large property-holders in the city of Little Rock have been received, and herewith transmitted, urging the confirmation of the floats as the only means of securing their titles, heretofore deemed good, and expressing the fullest

confidence that the bond aforesaid, upon such confirmation, will effect that object.

"Respectfully, your obedient servant,

"JAMES WHITCOMB,
"*Commissioner.*"

On receipt of this letter the Secretary of the Treasury wrote as follows:

"TREASURY DEPARTMENT, *September* 24, 1839.

"COMMISSIONER OF THE GENERAL LAND OFFICE.

"SIR: *Under the views presented in your letter* of the eighteenth instant, I see no sufficient objection to the confirmation of the floating entries, and the issue of patents thereupon.

"I am, respectfully, sir, your obedient servant,

"LEVI WOODBURY,
"*Secretary of the Treasury.*

"P. S.—All the papers are herewith returned."

Thus, at last, came to an end one of the most obstinate and long-contested controversies that have been adjudicated by the officers of the Land Department.

Now, the Philbrook claims were either represented in this controversy or they were not.

If they were not represented, then the claimants were guilty of such gross laches as amounted to a total abandonment of all claim.

The controversy as to the right to enter these lands was pending before the Land Department for over twenty years; certainly a sufficient length of time to enable all the parties having any interest to be heard.

But we have here the express adjudication of the Commissioner, of date September 18, 1839, that the owners of the New Madrid claims mentioned in the bill in this case were before him, and that the "floats were located *to secure the title to the holders of the New Madrid locations* and the pre-emption claims under the act of 1814."

Does any one imagine that an adjudication thus made, after twenty years of inquiry and deliberation, can now be set aside after forty-nine years of acquiescence? If so, he must certainly conceive that all of our land titles are destitute of any substantial foundation whatever.

In Simmons *v.* Ogle, 105 U. S., 271, it appeared that Simmons held under a patent dated June 12, 1874. Ogle filed a bill against him to compel a conveyance of the legal title, on the ground that he possessed a superior equity, claiming, in short, that he had entered the land long before the entry of Simmons, upon which the patent was issued to him. The Court say of a memorandum of an entry on the books of the Register of the Land Office, dated December 30, 1835, signed by the Register, being that under which Ogle claimed in opposition to the patent, that it is "open to the weakness which arises from the fact that in all such completed sales two other documents of superior probative force usually attend the sale, one of them invariably, neither of which is here produced or shown ever to have existed. The most conclusive of these is the patent. There is no pretense here that any patent ever existed to any one on Wistanley's purchase."

The other paper referred to by the Court was a certificate of entry. "This," the Court say, "is a paper in two parts, the first of which is signed by the Register, giving a description of the land, the amount paid for it, the name of the purchaser, and a statement that on its presentation at the General Land Office a patent would be issued to the purchaser. The second, signed by the receiver, is a simple receipt for the payment of the price and a description of the land for which it was paid."

It was the absence of these two papers that rendered the plaintiff's claim abortive.

So, under the New Madrid act, the claimant, on perfecting his title, was entitled to two papers, evidencing that fact—one the patent and the other the certificate of the

Recorder of Land Titles. (Hot Springs Cases, 92 U. S., 708.) Neither of these is produced, nor is their absence in any way accounted for. As for the certificates granted by Stillman O'Fish, Recorder of Land Titles in 1875, nearly forty years after the lands had been patented, they could be evidence of nothing save of official delinquency.

In the case of Simmons *v.* Ogle, just referred to, suit must have been brought very soon after the patent was issued.

The same thing is true of the case of Polk *v.* Wendal, (9 Cranch, 87,) in which the Court held that a patent justifies a presumption that all the previous requisites of the law have been complied with.

In the case of Minter *v.* Crommelin, (18 How., 88,) in order to sustain the patent the Court presumed an order from the Secretary of the Treasury, declaring that the lands had been abandoned by the Indians, though no evidence of any such order was made to appear. The Court said:

"The rule being that the patent is evidence that all previous steps had been regularly taken to justify making of the patent, and one of the necessary previous steps here being an order from the Secretary to the Register to offer the land for sale, because the warrior had abandoned it, we are bound to presume that the order was given."

It is in effect admitted by the bill that there was a time when the New Madrid claims were regarded as nullities. "The defects of the said New Madrid act, and of the locations thereunder, have been cured by subsequent acts of Congress; and the opinions of the Attorneys-General and decisions of the Departments in reference thereto, and in reference to the locations of said floats, have been overruled by later and better opinions and decisions of the Department, and by decisions of the Supreme Court of the United States."

Granting the truth of this allegation, it becomes quite

apparent that these "later and better decisions" were not foreseen by the New Madrid claimants, or any other persons, with absolute precision. In the meantime, these New Madrid claims were naturally regarded in the light of such opinions and decisions as had been officially promulgated. Taking, then, the case from the point of view of the plaintiffs, it is clear that the delay of fifty-five years, during which the New Madrid claims mentioned in the bill were allowed to sleep utterly destitute of animation, can only rationally be accounted for on the theory that during that time they were abandoned as being invalid in law and worthless in fact, or that they were duly presented to the Commissioner, as stated by him.

It is quite true that the bill states that the consent of the heirs of Philbrook and other settlers and claimants "to the location of said floats, and the issuance of said Beebe patents, was never obtained as required and provided by the act of Congress and the rules and regulations of the Land Department of the United States, as embodied in the circular of the United States Land Office of October 11, 1837." This is clearly a negative pregnant. Whether all the occupants of the land actually consented, it is now rather late in the day to inquire; nor is it of the least importance, after the lapse of so many years, to inquire as to whether the consent thus obtained was rendered in the precise form required by a circular letter issued from the Land Department.

The validity of the patent does not depend upon the ability of those who claim under it to show these facts. There was a time when it was essential to prove that consent; and there was a tribunal created by law to pass on the question, having plenary jurisdiction in the premises. This question was submitted to that tribunal, and it was decided by it. This decision has the force of a judgment of a court of record.

The exhibits filed with the bill show that the question of the consent of all parties having any interest was not only

involved, but that it was actually decided. They show that there had been a long and ardent contest between the various claimants. James Whitcomb, the Commissioner, was considered as one of the ablest men of the country at a time when the country was prolific of able men. It is not to be presumed that he passed on a question of so much weight without having all the parties in interest before him. To have done so under the circumstances, when the issue of the patent involved the title to the land on which a growing town, the capital of the State, was built, after the long and stringent litigation that had run its course in the Department, would imply a serious official delinquency. No such presumption can be indulged in. It is a maxim of the law that all official acts are presumed to be rightly done.

Certainly the Commissioner would not have said that the entry was allowed "to secure the title to the holders of the New Madrid locations," unless he had evidence satisfactory to his mind that the owners of those locations were before him by a proper representation. These things were not done in a corner. The letter of Whitcomb was published to the world; and it and the same accompanying documents have figured in several printed transcripts of this Court. For him to say that he permitted an entry in favor of A for the use of B, and to strengthen his title, without the consent of the latter, would have exposed him to ridicule and censure.

The decision of the land officers on a matter within their jurisdiction is of the same force and efficacy as a judgment of a Court.

Steel *v.* St. Louis Smelting Co., 106 U. S., 447.
Moore *v.* Robbins, 96 U. S., 532.

"Long and undisputed possession of any right or property affords a presumption that it had a legal foundation; and rather than disturb men's possessions, even records have been presumed.

Lyne *v.* Bank of Kentucky, 5 J. J. M., 562.

In Vance *v.* Burbank, 101 U. S., 514, there had been a contest between the parties in the Land Office in 1854. The equity suit to settle the title was brought in 1877.

The Court said in that case:

"No fraud is charged on the Register and Receiver, or on the heirs of Perkins in respect of the keeping back the evidence; if, in fact, any was not sent forward, and Scott did not discover the omission until within one year of the time of the commencement of this suit, he must have been grossly neglectful of his own interests. He does not now state what the omitted evidence was, or that it was anything more than cumulative. The extent of his averment is that it strongly supported his claim in the contest. For all we know, the other evidence may have been equally strong, and might have covered the whole ground. As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if in fact it existed, was discovered long before the contest in the Land Department; and if it had importance in the case, the amplest opportunity was given to show the error and get relief against the agreement. This is one of the matters that might have been presented to the Land Department, and therefore is concluded by the decision of that tribunal. Under these circumstances, it would be gross injustice to attempt to open that inquiry at this late day in favor of Scott himself, or any one claiming under him, upon his own title, irrespective of any his wife might have."

In that case only twenty-three years had elapsed from the time of the beginning of the contest in the Land Office until the bringing of the suit; in this case over sixty.

In the case last cited, the Court further said:

"The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or *quasi*-judicial tribunals are.

"It has been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the Depart-

ment, so that it may properly be said that there has never been a decision in a real contest about the subject-matter of inquiry. *False testimony or forged documents, even, are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal.* The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute."

In United States *v.* Schurz, 102 U. S., 401, the court said:

"It is clear that the right and duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that Department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of a patent, how can it be said that that instrument is absolutely void for such errors as these?

* * * * *

"Here the question is whether this land has been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent might be voidable, but not absolutely void.

"From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of the title has been performed. Whenever this takes place, the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away."

The exhibits show that there were many conflicting claims to this land, involving many questions of law and fact, including that of devolution of title. Philbrook and his associates did not claim except derivatively. So far as they were concerned, it was necessary to examine not only the validity of the New Madrid claims, but also the question as to whether those claiming under them had acquired their titles in such a manner as to give them a standing in the pending inquiry. Over all these questions the land officers had jurisdiction; and they had peculiar advantages in arriving at a satisfactory conclusion. In Wilcox *v.* Jackson, 13 Peters, 498, the Court likened the action of the land officers to that of a court of justice, and in doing so, citing the language of Elliott *v.* Piersol, 1 Peters, 340, said:

"Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause."

In the case of Quinby *v.* Conlan, 104 U. S., 426, the Court said:

"In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department, is negatived by the finding of the Court. *It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the Courts over the action of the numerous officers of the Land Department on mere questions of fact presented for their determination.* It is only when those officers have misconstrued the law applicable to the case, as established before the Department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the Courts can, in a proper proceeding, interfere and refuse to give effect to their action."

Nor will a court of chancery, in any case, interfere as against the patentee and those claiming under him, unless

the facts authorizing such action are *undisputed*. In Marquez *v.* Frisbie, 101 U. S., 476, the Court used the following language:

"But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, *on the undisputed facts*, belonged to another, to give appropriate relief.

* * * * * * *

"This means, and it is a sound principle, that where there is a mixed question of law and fact, and the Court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

In the same case, in speaking of loose and general allegations of fraud, such as make up the staple of the bill in this case, the Court further said:

"It is too obvious for comment that in all this the only use of the words fraud and fraudulent is to stigmatize acts which are adverse to the plaintiff's view of his own rights. But there is not a syllable which defines an act fraudulent in nature, or done or performed under the influence of corrupt motives, or by corrupt means, by the defendant or by any of the land officers who had to deal with his claim. These officers are not named. It is idle at this day to suppose that the expensive machinery of a court of equity is to be put in operation for the purpose of reviewing and reversing the judgment of the tribunals to whom that question is by law entrusted, in such loose, untraversable allegations of fraud in general."

In the case of Lansdale v. Daniels, 100 U. S., 118, the Court said:

"Complaint is made by the defendant of the Land Department in granting the patent to the plaintiff; but it is too clear for argument no case is made to warrant the Court here in reversing that decision. (*Shepley* v. *Cowan*, 91 *U. S.*, 330; *Moore* v. *Robbins*, 96 *Ib.*, 530.) Reference to these

authorities is sufficient to show that the defendant is not entitled to the relief asked; but if the law were otherwise, it would not benefit the defendant, as he does not show what questions were litigated before the land officers, nor does the record contain any specifications as to what the rulings of the officers were in regard to any particular point. It appears that there was a contest between the parties there, and that the case was decided in favor of the plaintiff; but the grounds of the decision are not stated. Such being the state of the pleadings, it is impossible to say that any error of law was committed by the tribunal."

In the recent decision of this Court, (*Steele* v. *St. Louis Smelting Co.*, 106 *U. S.*, 447,) the Court said:

"The validity of a patent of the Government cannot be assailed collaterally because false and perjured testimony may have been used to secure it, any more than a judgment of a court of justice can be assailed collaterally on like ground. If a judgment has been obtained by such means, the remedy of the aggrieved party is to apply for a new trial or take an appeal to a higher Court; and if the testimony was accompanied with acts which prevented him from presenting to the Court the merits of his case, or by which the jurisdiction of the Court was imposed upon, he may also institute some direct proceeding to reach the judgment." Citing with approval—

U. S. *v.* Flint, 4 Sawyer, 42, and other cases.

If the heirs of Philbrook had a valid claim at any time, doubtless they might abandon it.

House *v.* Talbot, 51 Tex., 467.

Thornton *v.* Murray, 50 *Ib.*, 161.

As we shall see hereafter, even a grant will be presumed in favor of long possession.

In Minter *v.* Cromelin, 18 How., 87, in order to uphold the patent the Court presumed that there had been a declaration by the Secretary of the Treasury that the Indian

reservation had been abandoned, though there was no evidence whatever of any such declaration.

In MacKay *v.* Easton, 19 Wall., 63, the plaintiffs claimed under a bond for title and a deed from J. Smith, which they and their predecessors in title had held for fifty-two years without any effort to enforce them. The Court said:

"The reasonable and natural presumption arising from all the circumstances is, that Gillespie finding, after receiving his deed, that Smith had already conveyed the property to Easton, and the right of location on other lands, in consequence of its injury, *did not assert any claim to the land*, and that thus the deed had been suffered to remain without any attempt to enforce it, *until the increased value of the land located had tempted speculators to test its efficacy by litigation.*"

In Fremont *v.* U. S., 17 How., 679, Fremont claimed under a Mexican claim which had long been neglected. The Court said:

"Upon this view of the subject, we proceed to inquire whether there has been any unreasonable delay or want of effort on the part of Alvarado to fulfil the condition. For, if this was the case, it might justly be presumed, as in Florida and Louisiana concessions, that the party had abandoned his claims before the Mexican power ceased to exist, and was now endeavoring to resume it, from the enhanced value under the United States."

The doctrine was reannounced in *French* v. *Fyan*, 93 *U. S.*, 172.

After the issue of a patent, it is not common for the patentee to preserve all the memoranda, the conveyances, and proofs upon which it was procured. All these are merged in the patent, which is considered as the highest evidence of title, superseding everything that was preliminary thereto. To require the patentee, or his heirs or assignees, nearly a half a century after the issue of the patent, to produce all the evidence necessary to make good his claim to the patent

in the first instance, would be rank injustice. This would be to invert the pyramid, to subordinate the patent as an instrument of evidence to the initial proofs on which it was granted.

The celebrated case of Grignon *v.* Astor, 2 How., 131, involved the validity of an order made by the County Court for the sale of land belonging to a deceased person. The Court said:

"The record of the County Court shows that there was a petition representing some facts by the administrator, who prayed an order of sale; that the Court took those facts which were alleged in the petition into consideration, and for these and divers other good reasons ordered that he be empowered to sell. It did then appear to the Court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner, and the decree of the Court does not specify the facts and reasons, or refer to the evidence on which they were made to appear to the judicial eye; they must have been, and the law presumes that they were, such as to justify their action. But though the order of the Court sets forth no facts on which it was founded, the license to the administrator is full and explicit, showing what was considered and adjudicated on the petition and evidence, and that every requisition of the law had been complied with before the order was made, by proof of the existence of all the facts on which the power to make it depended. We all know that even in the old States the records of these and similar proceedings are very imperfectly kept; that where it consists of separate pieces of paper they are often mislaid or lost by the carelessness of clerks, and their frequent changes. Regular entries of the proceedings are not entered on the docket as in adversary cases, nor are the facts set forth in the petition entered at large; and it is no matter of surprise that in so new and remote a part of the country as the place where these proceedings were had this state of things should exist. Nor is it necessary that a full or perfect account should appear in the records of the contents of the papers on the files or the judgment of the Court on matters preliminary to a final order; it is enough that there be something of record which

shows the subject-matter before the Court and their action upon it, that their judicial power arose and was exercised by a definite order, sentence, or decree. The petition in the present case called for a decision of the Court that the facts represented did or did not appear to them to be sufficiently proved. They decided that they did so appear, whereby their power was exercised by the authority of the law, and it became their duty to order the sale."

In the case of Philadelphia R. R. Co. *v.* Stimpson, 14 Peters, 458, the contest was as to the validity of a patent for an invention; but the rule in this respect does not vary from that applied in the case of a patent for land; and the Court so held. Story, judge, in delivering the opinion, said:

"The patent was issued under the great seal of the United States, and is signed by the President and countersigned by the Secretary of State. It is a presumption of law that all public officers, and especially such high public functionaries, perform their proper official duties until the contrary is proved. And where, as in the present case, an act is to be done, or patent granted, upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act, or granted the patent, is *prima-facie* evidence that the proofs have been regularly made, and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency. * * * Patents for lands, equally with patents for inventions, have been deemed *prima-facie* evidence that they were regularly granted, whenever they have been produced under the great seal of the Government, without any recitals of proofs that the prerequisites of the acts under which they have been issued have been duly observed."

In the case of Menrose *v.* Griffith, 4 Binney, 236, Chief Justice Tilghman, delivering the opinion, said that "after a great length of time conveyances from the original war-

rantee will be presumed in favor of a patent attended with possession."

"It is too much to require that the patentee, and those holding under him, should be called upon through all time to show that every legal requirement has been complied with; and particularly to be called upon to show that proofs had been made in cases depending upon verbal or parol evidence, of which no record was kept or required by law."

Styles *v.* Gray, 10 Texas, 503.
Briggs *v.* Jasper County, 49 Iowa, 485.

Various other decisions might be cited sustaining the same principle; but any farther citation would seem to be unnecessary. Perhaps no case has been presented to the Courts where the application of the doctrine in question was more imperiously necessary. In most cases land entries are made *ex parte*, with no opportunity to contest; but in this case there was an actual contest of unparalleled vigor and duration. In most cases we can only infer what questions were passed on from the fact that the patent was in fact issued; but in this case the letter of the Commissioner discloses the fact that the owners of the New Madrid claims were parties to the contest—victorious parties—in whose favor and at whose instance the patents were issued.

Considering that the contest in this case was pursued until a final decision was reached by the highest officers of the Government whose native province it was to decide such matters, it cannot be successfully asserted that the finding is inferior in dignity or conclusiveness to that the efficacy of which was tested in United States *v.* Flint, where a special act of Congress had created a local tribunal to pass on the title to the lands in controversy. In that act it was indeed declared that the finding of the commission should be conclusive; but Mr. Justice Hoffman, in delivering the opinion of the Court, conceded "that all final judgments of Courts of competent jurisdiction are

conclusive, and that the conclusiveness attributed by the act to final decrees in this class of cases is no greater than that possessed by other final decrees. All may be impeached for fraud;" so that part of the act was merely declaratory, and did not give any additional force to the action of the Commissioners.

But the same judge said:

"It will not be disputed that if the allegations in this bill are sufficient to show jurisdiction, every case heretofore decided under the provisions of the act may be reopened for examination in this Court on its merits, whenever the Attorney-General, or those to whom he may delegate his authority, consider themselves justified in alleging that false and fabricated documentary evidence of title has knowingly been presented. * * * In truth, stripped of all disguises, these proceedings are, in effect, appeals to this Court from the decisions of the special tribunals, or they are bills of review to set aside the decrees for newly-discovered evidence; and the allegations of fraud which are supposed to give jurisdiction to the Court only reveal more clearly the true nature of the suits."

The language thus used by the Court is vigorous and emphatic, but the ills to be apprehended from the successful maintenance of the suit in California was but insignificant when compared with those which would flow from a decree such as is prayed for in the bill in this case. In the suit of the *United States* v. *Flint* nothing more was proposed than to unsettle the titles that had been passed upon by a special local tribunal; but now the attack is made on the security of nearly all of the land titles west of the Alleghany Mountains; that is, on all the land titles that have emanated from the United States Government. There is not among these immense grants, on some of which prosperous cities are built, vying in wealth and population with the great capitals of the world, a square inch of ground that possesses the slightest immunity from litigation; nor would the humblest home on the frontier, the

modest abode of innocence and industry, be safe from the rapacious rescripts of a corrupt or an incompetent Attorney-General if this suit could be maintained.

On the authorities and on principle this case does not differ from an attack in chancery on any other judgment. If a sheriff or marshal's deed had been made fifty years ago, and the grantee named in it, and his assignees, had been continuously in possession, and some one should file a bill to cancel it, on the ground that the judgment in which the deed had its origin was rendered on a note which did not belong to the plaintiff in that suit, who had fraudulently claimed to be the owner of it, what would be said of such a suit?

The New Madrid claims referred to passed from hand to hand, with almost as much facility as a promissory note; and after so many years an inquiry on such a subject could not be otherwise than unsatisfactory, provided we go back of the finding of the land officers. An impartial judgment must result in the conclusion that they would be more apt to learn the truth than the Court would be at this remote period, when it is impossible even to charge fraud in a traversible manner. For the rest, Mr. Justice Field, in the Flint case, said:

"The frauds for which courts of equity will interfere to set aside or stay the enforcement of a judgment of a Court having jurisdiction of the subject-matter and the parties, must consist of extrinsic collateral facts not involved in the consideration of the merits. They must be acts by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdiction of the Court has been imposed upon. * * *

"If the present bill could be sustained upon the grounds alleged, and we should set aside the decree of the District Court, a new bill might, years hence, be filed to annul our judgment and reinstate the original decree, on the same grounds urged in this case, that fabricated papers and false testimony had been used before us, which eluded the scrutiny of the counsel and escaped our detection. Of

course, under such a system of procedure the settlement of land titles in the State would be postponed indefinitely, and the industries and improvements which require for their growth the assured possession of land would be greatly paralyzed."

Farther on, in speaking of a bill like the present, he says that "it does not lie where the decree in the original cause was obtained by consent, or where objections to the decree rendered were subsequently withdrawn, and consent was given to its execution."

In the same case Judge Sawyer said:

* * * "It is a startling proposition to those who hold patents to lands issued upon confirmed Spanish or Mexican grants that after twenty-five years of compulsory litigation, intended, in the language of the various acts of Congress, to 'settle titles to land in the State of California,' the holders of all such patents are liable to be called upon to relitigate their claims with the Government in the ordinary courts of justice; and that the patent, instead of being conclusive evidence of a 'settlement' of the title—the end of litigation—is but the foundation for the beginning of a new contest to unsettle it, in the tribunals of the country, which before had no jurisdiction whatever over the subject-matter. The very institution of these suits in the name and by the authority of the Government was well calculated to produce, and doubtless did produce, a general distrust of such titles, and a widespread, if not well-founded, alarm."

It is almost needless to say that the case made in U. S. v. Flint was infinitely stronger than that made by the bill in the present suit. In that case it was alleged in the bill that the former adjudication was based on a forged grant, which had been fraudulently introduced in evidence by the successful party, the forgery not being at the time suspected by the adverse claimants. The case was referred to by McCrary, J., in Brooks v. O'Hara, 8 Fed. Rep., 533, as

being a very strong one. Yet it went off on demurrer to the bill. The case was affirmed in the Supreme Court, when Mr. Justice Miller, in delivering the opinion, said:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from Court, a false promise of compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently, or without authority, assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside or annul the former judgment or decree, and open the case for a new and fair hearing.

* * * * * *

"On the other hand, the doctrine is equally well settled that the Court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

U. S. *v.* Throckmorton, 98 U. S., 66.

Sixth Proposition—The heirs of Philbrook are estopped from setting up any claim to the land.

We have seen that the bill passes over a period of fifty years by merely saying that the town was laid off and incorporated, and the city was built. One might be curious to know what the heirs of Philbrook were doing while others were building cities; but no light is thrown on that subject. It is obvious that persons standing by and seeing lands so often bought and improved by others, believing

that they had a title, without making known their claim, are estopped from setting up a title in themselves.

Danley *v.* Rector, 10 Ark., 212.
Shall *v.* Biscoe, 18 *Ib.*, 165.
Horner *v.* Hanks, 22 *Ib.*, 583.
Chapman *v.* Chapman, 59 Penn., 214.
Cumberland R. R. Co. *v.* McLanahan, *Ib.*, 23.

Seventh Proposition—The statement in the bill that the ruling made by the land officers in allowing the entries has since been overruled "by later and better decisions," shows no ground of equitable jurisdiction.

The statement of the proposition is its own best refutation. It is not true that whenever a legal principle is overruled, all cases previously adjudicated can be, on that account, re-opened and re-adjudicated. If that were so, no title could ever be called secure. Every decision departing from any previous decision might renew litigation that had long been closed, and would be attended by perils which could not be foreseen.

In the case of Doe *v.* Watson, 8 How., 272, the Court said:

"A decision thus made, and which seems to have been acquiesced in for more than half a century, within which time the property, by descent or otherwise, must have passed through the hands of persons who belonged to two or three generations, and which has necessarily become a rule of property, would seem to close all litigation under the will. But if the question remained open and unaffected by the lapse of time, the change of owners and the great increase of value in the property, we should have difficulty in coming to any other decision than the one above stated."

In Willis *v.* Valette, 4 Met., (Ky.,) 186, the Court said:

"Facts before the Court at the time of the original trial

furnish no ground for a new trial, even if the decision upon them has been erroneous."

The view taken of the law on this subject in the bill has nothing to support it. So far is it from being true, when a cause has been decided by the Supreme Court, and it comes before that Court again, the former decision is taken as being a final settlement of the controversy, as far as it extends, even though the Court should be convinced that it was wrong.

Porter *v.* Hanley, 10 Ark., 186.

Regarding this subject, the Supreme Court of Arkansas has used the following language:

"Public policy, as well as public liberty, require that the power of every department of the Government should be circumscribed and limited; and this we conceive to be equally necessary as well as to the time and manner in which, as to the subject-matter over which, they shall be exercised. To concede that this Court could at any term subsequent to the one at which a final judgment may be rendered order the judgment to be annulled and vacated and grant a new hearing, and again render judgment different from the one originally pronounced, would be to concede a power most gigantic and dangerous. In such case the determination of the Court over a question, no matter what lapse of time may have intervened since the rendition of the judgment, would not be conclusive upon the rights involved or afford security to the parties litigant. No man could tell when the Court might see fit to review an opinion pronounced in his favor, and in consequence of a change of opinion, or a change of judges upon the bench, reverse the opinion originally rendered, and give judgment against him."

Ashley *v.* Goodrich, 6 Ark., 101.

There is hardly any reason to doubt that the land officers made in an early day many decisions that would now be regarded as erroneous. Considering the intricacy of the land laws, we know that this must have been the

case; but that is no reason why the Attorney-General should have discretion to bring and maintain suits to unsettle a great part of the land titles in the country.

Even where a will has been probated and property has been sold under it the sale is not affected by the fact that afterwards a later will is found appointing a different executor, and making a different disposition of the property.

Davis *v.* Gaines, 104 U. S., 386.

VI.

Eighth Proposition—The claim is barred by statute of limitations; and this fact appears on the face of the bill.

Where this is the case, the objection may be made by demurrer.

Lansdale *v.* Smith, 106 U. S., 391.

Courts of equity look at facts as they are, and not at forms. Calling this a suit in behalf of the United States does not make it so. The name of the Attorney-General to the bill does not change the real facts of the case.

The bill shows that the real controversy is between Dietrich and his associates and the heirs of Beebe. Therefore it is wholly and solely between private parties. The maxim that time does not run against the king was not formulated for the purpose of protecting the interests of Dietrich and others. It is applied solely to protect the property of the Government. The reason of the rule is that "the time and attention of the sovereign must be supposed to be occupied by the cares of government, nor is there any reason why *he* should suffer by the negligence of his officers, or by their fraudulent collusion with the adverse party." (Broom's Leg. Max., 46.) This reason has no application to Dietrich. He

is not supposed to have been occupied with the cares of government, he has no officers, and no reason exists why he should not be required to exercise the same diligence that is required of other private citizens. There is no reason why Dietrich should not suffer the same penalties for negligence that are imposed on other citizens in like case. Whatever may be the limits of the powers of the Attorney-General, he certainly has no power to absolve any citizen from any responsibility which he may have incurred, expressly or by implication, toward any other citizen. If a citizen has conveyed land to another, there is no power in the Attorney-General to cancel that conveyance. If a citizen has by his laches suffered lands belonging to him to be transferred by limitation or prescription to another, the Attorney-General has no power to strip the latter of his title and restore it to the former. This is only to say that the Attorney-General has no dispensing power over the laws. He is as much bound by them as the bumblest citizen. What he cannot do directly, that he cannot do indirectly. He cannot impair or destroy any vested right by intervening in private disputes, using the name of the United States to cover his intervention. Principles of law designed to protect the United States cannot be extended to protect private persons who may chance to be favorites of an Attorney-General. When the reason of any particular law ceases, the law itself ceases. If the United States sues as the representative of the rights of another, it cannot by that act enlarge his rights by diminishing those of some one else. That would be taking the property of A and giving it to B. This the Government cannot do lawfully, even though every department should participate in the act. Certainly it is not within the discretion of the Attorney-General to do anything of the sort. These truths seem to be self-evident.

If the law were otherwise, a suit which a private indi-

vidual might be entitled to bring on any bond executed to the Government would never be barred. No length of time, no amount of laches, would ever discharge the obligors.

The real point here was decided in New Hampshire *v.* Louisiana, 108 U. S., 89. In that case the nominal title to the bonds sued on was in the State; but the Court said:

"No one can look at the pleadings and testimony in these cases without being satisfied that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons."

It is hardly too much to say that in the State of Arkansas the validity of far more than half the land titles rests upon the statute of limitations. To evade the statute in any way would be to compass in a wholesale manner the destruction of the most important muniments of title. The limitation in actions to recover lands is seven years.

Mansfield's Dig. St., 1884, sec. 4471.

It has been often said that laws of proscription have formed a part of the jurisprudence of all civilized nations, ancient and modern, save that of the Jews. Such laws were embodied in the twelve tables of Roman law. By the civilians they are regarded as a part of the natural law, found among all races, as they are no less a part of the law of nations.

Felice, Code de l'Humanite, vol. 2, *p.* 212.

In the case of Miller *v.* State, 38 Ala., 604, the Court said:

"Though the State is a party to this suit, it has no real interest in the litigation. If there be a right of recovery, the property sued for belongs not to the State, but to the township; so that, in point of fact, the suit is substantially between the township and the defendant. * * * In

our opinion the rule that the statute of limitations does not run against the State has no application to a case like the present, where the State, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third person, who alone will enjoy the benefits of a recovery."

In the case of The State *v.* Pratt, 8 Mo., 286, 40 Am. Dec., 140, the suit was on a bond given to the Governor of the State.

The Court said:

"It was objected that this bond is like one given to the State, and that the statute of limitations does not run against the State. The principle which prevents the statute of limitations from running against the State does not apply to official bonds given to the State for the use of individuals who may be aggrieved by the misconduct of those officers. In such cases, although the bond is nominally given to the State for the sake of convenience, yet in reality every cause of action on the bond, besides those the State may herself have, is a private concern, and not at all within the principle which, from considerations of policy, forbids the State to be barred by the statute of limitations from suing in cases in which she herself in her corporate capacity may be interested."

Moody *v.* Fleming, 4 Ga., 116, was a proceeding by mandamus, in the name of the State, to compel a county surveyor to certify and send up a certain survey.

The Court said:

"It is insisted that here the State is a party moving the contest, and setting up a right to have this survey certified, and that the tenant will not be protected by his possession, because the statute of limitations does not run against the State. We have decided, and the decision is sustained by unbroken masses of authority, that the statutes of limitation do not run against the State. The answer, however, to this argument is this: The State of Georgia is not the real party to the proceeding. She is not asserting any right, and is not before the Court. The petition for a man-

damus is by a private individual, and it was upon that petition alone that the decision complained of was made. But if the writ had issued, and the writ of error was founded upon alleged errors in a judgment growing out of the writ and the return, *then* the State would be no party. *The process, it is true, is in the name of the State, but the right asserted is a private right. The issue is between two of the citizens of the State.* * * * In this view of the subject, we concede that the maxim '*nullum tempus occurrit regi*' has no relevancy."

In Broadstreet *v.* Huntington, 5 Peters, 446, the Court said:

"Though the king cannot be a disseisor, his grantee shall be such; and the reason given is, 'because he has time and leisure to inquire into the legality of his title, which the king is supposed to want leisure for.'"

In Voorhees *v.* Bank of the United States, 10 Peters, 473, the Court said:

"No rule can be more reasonable than that the person who complains of an injury done him should avail himself of his legal rights in a reasonable time, or that that time should be limited by law. This has been wisely done by acts of limitation on writs of error and appeals. If that time elapses, common justice requires that what a defendant cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion."

In Grignon *v.* Astor the Court cited this language with approval, Judge Baldwin saying:

"We do not think it necessary now or hereafter to retrace the reasons or authorities on which the decisions of this Court in that case, and those which preceded it, rested. They are founded on the oldest and most sacred principles of the common law. Time has consecrated them, the Courts of the States have followed, and this Court has never departed from them. They are rules of property on which the repose of the country depends."

This extract is again cited (Sargeant *v.* State Bank, 12 How., 386):

"Although a confirmed claim under the act of 1823 is on its face a better title than that acquired under a patent issued before the confirmation of, but subject to, that claim, yet if the patentee has been in possession seven years before suit brought, the Illinois statute of limitations will protect him."

Dredge *v.* Forsyth, 2 Black., 564.

In Bryan *v.* Forsyth, 19 How., 334, the Court said:

"In the interval between 1823 and the survey a patent was taken out, which was issued subject to all the rights of persons claiming under the act of 1823. This patent was controlled by the subsequent survey.

"But although it was controlled by the subsequent survey, yet the patent was a fee-simple title upon its face, and sufficient to sustain a plea of the statute of limitations in Illinois, which requires that possession should be by actual residence on the land under a connected title in law or equity, deducible of record from the United States," etc.

In Crosby *v.* Buchanan, 23 Wall., 453, the Court said:

"The transactions out of which this case arises occurred sixty-five years ago. The estate of William King has been the subject of litigation in some form or other during all that time. This particular suit was commenced thirty-six years ago and more. It is high time it was ended. At any rate, *we are not inclined to add to its length of years by looking after mere form in order to avoid substance.*"

In no Courts have the statutes of limitation been more favorably construed than in those of the United States, as the following cases will show:

Bell *v.* Morrison, 1 Peters, 360.
McCluny *v.* Silliman, 3 Peters, 278.
Hamkins *v.* Barney, 5 Peters, 466.

In Pillow *v.* Roberts, 13 How., 477, the Court below had

refused to admit in evidence certain tax-deeds that were void to support the plea of the statute of limitation. The Court said:

"But, assuming these deeds to be irregular and worthless, the Court erred in refusing to receive them in evidence, in connection with proof of possession, in order to establish a defense under the statutes of limitation."

* * * * * *

See also *Wright* v. *Madison*, 18 *How.*, 57.

In Willison *v.* Watkins, 3 Peters, 51, it was contended that, as a tenant is estopped to deny the title of his landlord, neither he nor any one claiming under him could plead the statute of limitations. The Court said:

"If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming; and we must be convinced, beyond a doubt, that the law is so settled before we could give our sanction to such a doctrine."

See also Lewis *v.* Marshall, 5 Peters, 478.

Nor will the Courts permit the statute to be evaded by any device whatever.

In Gorman *v.* Judge, 27 Mich., 141, the Court said:

"But long before this amended declaration was filed, or leave to file it applied for, the statute of limitation had taken effect upon and barred the cause of action set forth in it. Had a new suit then been commenced for the same cause of action, it is not pretended that it could have been maintained; and we see no substantial difference between the commencement of a new suit and the allowance of this amended declaration, under these circumstances, for the same cause of action. It is clear enough that the only purpose and object of allowing the amended declaration, instead of putting the plaintiffs to a new action after they had submitted to a non-suit, was to prevent the statute bar of the action. *We do not think that the statute can be evaded by any such necromancy;* and to permit the shallow fiction

of a relation back to the commencement of the suit, under such circumstances, to nullify an act of the Legislature, would be discreditable to the judiciary."

In all the cases the Courts look at the true character of the suit.

Removal Causes, 100 U. S., 469.

If the theory of this bill can be maintained, a patent is the most insignificant and least weighty evidence of title known to the law. A void tax title made in 1838 or 1839, accompanied by possession since that time, would have been conclusive evidence of title; but now we are told that patents of the same dates, accompanied with the like possession, may be set aside with as much ease as if the suit had been brought the day after they were issued.

VII.

Ninth Proposition—Conceding that the real party in interest is the United States, nevertheless after such great laches the suit will not lie.

In order to see how it could ever have entered into the mind of man to begin this suit, it is necessary to indulge in some retrospection.

In the case of Easton *v.* Salisbury, 21 How., 426, decided in 1826, the contest was between persons claiming under a patent issued to the representatives of one J. Smith and persons claiming under a Spanish grant in favor of Mordecai Bell. The Court held that the Spanish grant was the older and better title, and somewhat incautiously used the following language:

"There was no period from the entry and patent of the New Madrid claim in which the claim was valid. The location was not only voidable, *but it was absolutely void*, as it was made on lands subject to prior right."

Hereupon certain speculators in ancient land titles concluded that there was a chance to swoop down upon a large part of the tract covered by the patent which was not included in the claim of Bell. As this Court had said that the patent to Smith was void, they concluded that the title was vested in the United States. They had recourse to Congress; and, strange as it may seem, they succeeded in procuring the passage of an act, approved June 30, 1864, by which the United States relinquished all its right to any land located by J. Smith, to him or his legal representatives. (13 Stat., 581.) We have not inquired on what pretense this act was procured. But having procured it, the parties at work proceeded to set up a title. They, like the claimants in this suit, said that their predecessor in title had been grossly wronged; and the wrong was the worse from the fact that a large part of the city of St. Louis was built on the land. They produced a bond for title from Smith to one Gillespie, dated April 14, 1816, and a subsequent deed from Smith to Gillespie, conveying the lands sought to be recovered, and fifty years after their dates these instruments were placed on record. Whether these deeds were forged or not it was of course impossible to say, after such a long lapse of time, as Smith was an illiterate man, and had long been dead, and was otherwise forgotten.

However ingenious this plan may have appeared to the persons who had devised it—and it certainly showed a higher degree of sagacity than that displayed by the plaintiffs in the present case—it was not destined to be crowned with success. The Supreme Court of the United States explained its opinion as given nearly fifty years earlier, and held that the location was not absolutely void; but that it was void only in so far as it conflicted with the Spanish claim of Bell. Mr. J. Field, in delivering the opinion of the Court, said:

"In Easton *v.* Salisbury the controversy was between a

Spanish concession to Mordecai Bell and the title of Easton, under the location upon the New Madrid certificate issued to Smith. The claim under the Spanish concession was confirmed by act of Congress to the legal representatives of Bell. The land claimed under this concession was reserved from sale, and could not, therefore, be covered by the New Madrid certificate. So far as the location interfered with the concession it was void, and to that extent the patent was void also, but no further. The general language of the opinion must be construed and limited by the facts in the case."

Mackay *v.* Easton, 19 Wall., 619.

The case of Cunningham *v.* Ashley, 14 How., 379, involved the title to a large part of the land described in the bill in this case. In that case, in deciding in favor of Cunningham, the Court used this language:

"Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued were void, so far as they interfere with the claim of the complainant, for the reason stated, and that consequently the patents are also void."

No sooner had this opinion been published than certain parties about Washington began to insinuate that there was no patent for the land upon which Little Rock is built, and that it was therefore subject to entry as Government land. They said that the Supreme Court had held that the patents were *void;* and of course a void patent is the same as no patent. They either would not or could not see that the language of the Court was to be limited by the facts before the Court.

We have said that the parties could have brought suit at any time within sixty years; but the ordinary justice administered in the Courts of the country would do them no good. It was necessary for them to wait until some Attorney-General could get into office who might be induced to endeavor to throw the shield of the Government over a

claim, which, confessedly, could otherwise not have been able to secure one moment's attention in any court of justice.

We admit that the statute of limitations cannot be successfully pleaded against the United States. But, like all other legal principles, the maxim *nullum tempus occurrit regi* has its limitations. It has never been much of a favorite. Mr. Reeve is of the opinion that the "Mirror of Justice" was written partly before the conquest, and partly in the reign of Edward II. In this most ancient of our law books it is stated that at some time between the reigns of Alfred and Edward I "it was ordained that the King's Courts should be open to all plaints, by which they had original writs without delay, as well against the King, or the Queen, as against any other of the people, for every injury, but in case of life, when the plaint held without writ." And in the chapter on abuses of the common law the author complained that "the first and chief abusion is that the King is above the law, whereas he ought to be subject to it, as it is contained in his oath."

Mirror, c. 1, sec. 3; c. 5, sec. 1.

It is to be remarked that as early as the first year after the landing of the Pilgrims in Massachusetts a general statute of limitations against the Crown was passed under the significant title, "An act for the general quiet of the subject against all pretenses of concealment whatever." Several later acts of Parliament have been passed on the same subject, the last being that of 24 and 25 Vict., c. 62, by which the maxim *nullum tempus* is abolished in England, and the sovereign is placed substantially on the same footing as to the statutes of limitation as that occupied by the subject. The contents and dates of these several acts may be found by reference to *Wood on Limitations, sec.* 52, *n.* 1.

In a number of the States similar statutes have been

enacted, as in New York, (People *v.* Clarke, 10 Barb., 120,) in California, (Weber *v.* Harbor Commissioners, 18 Wall., 58,) in Massachusetts, (Piper *v.* Richardson, 9 Metc., 155,) in Mississippi, (Joiner *v.* State, 1 Cushman, 500.) Similar legislation has, no doubt, been had in other States.

In a few of the States the Courts have construed the maxim away. In Tennessee it is said to be but a corollary from the maxim that the King can do no wrong, and, therefore, inconsistent with our republican institutions.

State *v.* Crutcher, 2 Swan, 504.

In Connecticut it is held that possession, as long as the oldest witness can remember, will give a title as against the State.

Church *v.* Meeker, 34 Conn., 429.

In Kentucky the Courts presume a grant after the lapse of a period equal to the longest time required by the statute in the case of private suitors.

Million *v.* Riley, 1 Dana, 362.

As a general rule, the sovereign appearing in any Court is held to waive its supremacy, and to stand on a perfect equality with other suitors.

In United States *v.* Fossatt, (21 How., 450,) which was a case of contest between the Government and a private citizen alone, the Court said:

"The United States did not appear in the Court as a contentious litigant, but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their Executive Government to comply with that obligation."

As a suitor, the Government is precluded by its own negligence to claim rights under negotiable paper that could not be claimed by a private person under like circumstances.

"It must be taken as settled that when the United States becomes a party to what is called commercial paper—by which is meant that class of paper which is transferable by indorsement or delivery, and between private parties is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation—they are bound in any Court to whose juridiction they submit by the same principles that govern individuals in their relations to such paper."

The Floyd Acceptances, 7 Wall., 675.

"It was held in the case of the United States *v.* Barker, 4 Wash. C. C. R., 464, that the omission of the Secretary of the Treasury for one day to give notice of the dishonor of bills which were purchased by the United States discharged the drawer. And this Court said, when that case was brought before it, there was no right to recover, on account of the neglect in giving notice after the return of the bills. That, and all other cases like it, show how rigidly those principles have been applied in suits on bills and promissory notes in which the United States was a party."

United States *v.* Bank of Metropolis, 15 Pet., 393.

"Whether, therefore, the judge erred or not as to the first part of his charge in respect to the transmission of the bills from England in a reasonable time, there was no doubt that the United States had no right to recover on account of the neglect to give due notice after the return of the bills."

United States *v.* Barker, 12 Wheat., 561.

"The United States, being a drawer of a protested bill, is liable to pay damages."

Bank of U. S. *v.* United States, 2 How., 711.

Goods of the United States are subject to the claim of general average, and may be retained by the owner of the vessel until it is discharged.

Story, J., in U. S. *v.* Wilder, 3 Sumner, 308.

So property of the United States is subject to a lien for salvage.

The Davis, 10 Wall., 15.

Same thing in England—The Betsy, Marriott, R., 80, 82.

Briggs *v.* Life-boats, 11 Allen, 169.

The liability of a State issuing negotiable securities is the same as that of individuals or corporations in such cases.

Walker *v.* State, 12 S. C., 200.

In Mitchell *v.* U. S., 9 Peters, 557, the Court said:

"By the common law the King has no right of entry on lands which is not common to his subjects. The King is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action. Their right is the same, though the King has more convenient remedies in enforcing his. If the King has no original right of possession to lands, he cannot acquire it without office found, so as to annex it to his domain."

"The United States must use due diligence to charge the indorsers of a bill of exchange, and they are liable to damages if they allow one which they have accepted to go to protest. In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in nowise involved."

United States *v.* State Bank, 96 U. S., 36.

The State, by long acquiescence and continued recognition of a municipal corporation through her officers, will be precluded from an information to deprive it of franchises exercised in accordance with the general law.

State *v.* Leatherman, 38 Ark., 81.

"The United States, when they contract with their citizens, are controlled by the same laws that govern the citizens in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

United States *v.* Bostwick, 94 U. S., 66.

"The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party."

United States *v.* Smith, 94 U. S., 217.

In United States *v.* Ringgold, 8 Peters, 151, it was held that, where a suit is brought by the Government, a set-off may be pleaded by the defendant. The Court said:

"No direct suit can be maintained against the United States. But when an action is brought by the United States to recover money in the hands of a party who had a legal claim against them, it would be a very rigid principle to deny him the right of setting up such a claim in a court of justice."

In the case of The Siren, 7 Wall., 159, the Court said:

"But although direct suits cannot be maintained against the United States or against their property, yet when the United States institute a suit they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed; and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. * * * So, if property belonging to the Government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the Court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the Government; and by its appearance in Court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors."

When one State holds lands within the limits of another State, it holds it subject to all the incidents of ordinary ownership.

Burbank *v.* Fay, 65 N. Y., 62.

Chief Justice Marshall assumed it to be an axiom of public law that "an independent foreign sovereign cannot be sued." But if he goes into Court his name and his pretensions go for nothing in the examination of a title, in the consideration of the equities between other parties; or, to use the language of the Chief Justice—

"The interests of the sovereign in such a case, and in every other in which he chooses to assert them under the name of the real party in the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession is in the defendant, the inquiry cannot be stopped by the mere assertion of title in the sovereign. The Court must proceed to investigate the assertion and examine the title."

Osborne *v.* U. S. Bank, 6 Wheat., 870.

If a foreign sovereign voluntarily comes into an English Court as plaintiff in a suit, he stands with reference to that case like any other suitor, and may therefore be obliged at law to give security for costs, and in equity to answer a cross-bill under oath.

Briggs *v.* Life-boats, 11 Allen, 185, and cases cited.

Where a claim is assigned to the United States, it has no better title than the assignor, and the statute of limitations is a good plea to such an action, if it would have been good as against the assignor.

United States *v.* Buford, 3 Peters, 12.

The State is bound by an estoppel contained in a deed.

Carver *v.* Jackson, 4 Peters, 87.

Where a committee of the Legislature sold certain lands to an alien, not capable of holding lands, and the State received the purchase-money therefor, it was held that the State was estopped from setting aside the conveyance on account of the alienage of the grantor.

Comm. *v.* Andre, 3 Pick., 225.

So a resolution by the Legislature fixing the boundary of a tract of land estops the State afterwards from claiming any land beyond the boundary thus defined.

Comm. *v.* Pejepscut, 10 Mass., 165.

A State may be estopped by her general course of legislation; as where acts are passed that presuppose the validity of bonds claimed to have been issued by it.

In re. Governor, 49 Mo., 224.

The Government may be estopped by possession by one whose title has been acknowledged by her officers.

Niete *v.* Carpenter, 7 Cal., 527.

In United States *v.* McDaniel, 7 Peters, 1, the Court allowed the defendant an equitable claim for services rendered the Government, though there was no act of Congress providing for the case, and an auditor of the Treasury could not have allowed the claim. The Court said:

"For more than fifteen years the claimant has been paid for similar services, and it is now too late to withhold it for services actually rendered. It would be a novel principle to refuse payment to the subordinates of a Department because their chief, under whose direction they had faithfully served the public, had mistaken his own powers, and had given an erroneous construction of the law. But the case under consideration is stronger than this. It is not a case where payment for services is demanded, but where the Government seeks to recover money from the defendant to which he is equitably entitled for services ren-

dered. The Court cannot see any right, either legal or equitable, in the Government to the sum of money for the recovery of which this action was brought."

In that case the Court laid some stress on the fact that the action was in assumpsit, in which equitable rules obtain.

The case of Brent *v.* Bank of Washington, 10 Peters, 615, is an extremely instructive one. Brent had given certain notes to a bank which held a lien on certain stock of the bank owned by him to secure the payment of the notes. Brent died, owing these notes, as well as a debt to the United States exceeding the value of his whole estate. The executors filed a bill against the bank to compel the bank to transfer the stock, on the ground that, as the United States, under the law, was entitled to be first paid, the lien of the bank was gone. It thus appeared that the executors were really suing for the use of the United States; but the Court held that the Government was not entitled to require the bank to give up its lien. On this point the Court said:

"In good conscience there can be no claim more equitable than that of a bank for money lent; and if the law has placed them on the *tabula in naufragio*, it little comports with the principles of equity to take it from them merely because, by the death of Mr. Brent before the protest of the third note, the legal lien secured by their charter had not become consummated before the legal right of the United States had attached to priority of payment out of the estate. An individual asserting such a claim in equity against the bank, in virtue of an act of bankruptcy, an execution, or assignment, between the date and the protest of the note, would be compelled to do equity before he could enforce his legal right; and we can perceive no reason why the United States should be exempted from this fundamental rule of equity, subject to which its Courts administer their remedy.

* * * * * *

"Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other

suitors, seeking in the administration of the law of equity relief; to give which courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This Court, in Mitchell *v.* United States, 9 Peters, 743, have recognized the principle in the common law that, though the law gives the King a better or more convenient remedy, he has no better right in Court than the subject through whom the property claimed comes to his hands. This principle is also carried into all statutes, by which the appropriate Courts are authorized to decide on the rights of a subject in controversy with the King, according to equity and good conscience between subject and subject."

The maxim *nullum tempus* was always qualified by the presumption of a grant after a long lapse of time; that is to say, the Court refused to apply the maxim wherever it would manifestly work injustice.

In Mayor *v.* Hornor, Cowp., 102, Lord Mansfield held that a grant or charter from the Crown, which ought to be matter of record, might under circumstances be presumed, though within time of legal memory. "The fact in such case is presumed for the purpose, and from a principle, of quieting the possession, and not because the Court really think a grant has been made."

Jackson *v.* McCall, 10 John. R., 380.

"Though lapse of time does not of itself furnish a conclusive legal bar to the title of the sovereign agreeable to the maxim *nullum tempus occurrit regi*, yet if the adverse claim could have had a legal commencement, juries are instructed, or advised, to presume such commencement after many years of uninterrupted adverse possession or enjoyment."

Lewis *v.* San Antonio, 7 Texas., 304.

After a long-continued enjoyment, a grant from the Crown is always presumed. (3 Starkie, 1221; 2 Whart. Ev., sec. 1348.) In England, charters, and even acts of Parliament, have been presumed after long possession, ac-

companied by uncontested acts of ownership. In Roe *v.* Ireland, 11 East., 280, where there had been a long possession, but no grant from the Crown could be found, Lord Ellenborough said: "I would presume anything capable of being presumed in order to support an enjoyment for so long a period." He also quoted Lord Kenyon as saying, in a like case, "that he would not only presume one, but one hundred grants, if necessary, to support such a long enjoyment."

* * * "A defense peculiar to the courts of equity is founded on the mere lapse of time and the staleness of the claim in cases where no statute of limitations directly governs the case. In such cases courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."

2 Story Eq., 1520.

The Government cannot claim any exemption from the operation of this just rule.

In one case, reference was made to the Attorney-General to inquire whether suit should be maintained on a stale claim in favor of the Government against the estate of one Reside. The officer replied:

"The lapse of time alone would determine the case in favor of Reside's estate. It is a decisive answer to say that the claim is based on transactions which are twenty-three years old. It is a rule of common sense and reason, as well as law, that when a party to a claim has lain by until the evidence concerning it has ceased to exist, and then produces it, the other party is not bound to explain it. It is presumed that he could explain it if his witnesses were alive and his papers preserved; and that presumption shall stand in place of all the proof which might have been demanded when the matter was fresh. I admit that the statute of limitations cannot be pleaded

against the Government as a technical bar. I do not speak of that conclusive legal presumption which will be created in six years against an individual. But the Government is bound like anybody else by the rules of evidence, and by the natural presumptions arising from the facts of the case. In some countries there are no statutes of limitation; in all countries there are large classes of cases to which the statutes do not apply. But it is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied; and such lapse of time proves that fact as fully as if it had been attested by credible witnesses. The experience of all mankind has shown that the evidence thus furnished by time is true and reliable. The judge who disregards it would decide against the original honesty of the case ninety-nine times in a hundred.

"There is no such impeccability ascribed to the Government as will give it the right to deny the evidence. When time testifies against the sovereign, it is heard with as much respect as any other witness would be.

"This is the rule which must be applied to every stale claim, even when it seems to have been clear and free from dispute at first. But where it was originally doubtful and obscure, the presumption which time raises against it is a thousand-fold stronger; and stronger still where the obscurity was produced by the fault of the party setting up the claim."

Opinion of Black, Attorney-General, in Reside case.
9 Opinions of the Attorneys-General, 204.

Perhaps the only case ever before the Courts in the whole history of the country bearing much resemblance to the present one, in respect of its staleness, is that of People *v.* Clark, 10 Barb., 120. In the days of political excitement between the renters and anti-renters in New York, the General Assembly of that State passed an act directing the Attorney-General to bring a suit to cancel certain patents granted before the Revolution. The Court said:

"The second ground for vacating the letters-patent alleged in the complaint is, that the Lieutenant-Governor,

George Clarke, was interested in the grant, and that that interest was fraudulently concealed from the Colonial Council and the Crown. A man intrusted with power by his sovereign ought not to use that power for his own advantage, and to the injury of his sovereign; and if he do, he ought to be punished. But if in this case the usual rent was reserved to the Crown, and the usual condition of settlement inserted in the patent, how was the Crown defrauded? The complaint makes no suggestion that the letters-patent do not contain the full rent and all reservations and conditions in favor of the King which were at that day usually inserted in letters-patent; nor does the complaint contain a suggestion that any fraud was practiced to the prejudice of the King. *I deny that the judicial history of the world can furnish an example where an emperor, a king, or a republic, whether heathen or Christian, has, before this, brought a subject or citizen into Court to answer for a fraud committed by some person through whom he claims title one hundred and twelve years before he was called on to answer. In the days of Methuselah witnesses might have been found to testify in relation to a fraud one hundred and twelve years after it was committed; but it would now be idle to attempt to find such witnesses. And does not the well-being of the State and the interest and security of individuals demand that even sovereigns shall not commence actions founded on transactions in in relation to which no man now living is old enough to testify? The members of the Colonial Council and the King, from whom it is alleged that the interest of Lieutenant-Governor George Clarke was fraudulently concealed, have long since returned to their original dust, and no one but Him who rules in Heaven can know what was or what was not concealed from them.* If a claim so stale as this be countenanced by any court, no man holding under a colonial grant can have perfect confidence in his title.

"In the case of Mayor of Hull *v.* Hornor, Cowper's Reports, 110, Lord Mansfield said: 'I remember in general, though I can not recollect the particulars of it, a case in the Dutchy Court, between the King and Mr. Brown of Snelbrook. It was before the late *nullum tempus* bill. The evidence in support of the title was a possession and enjoyment of one hundred years, and I held that, though such possession and enjoyment could not conclude as a positive bar, because there was no statute of limitations

against the Crown, yet it might operate as evidence against the Crown of right in the defendant, if the claim could have a legal commencement; though such commencement could not be shown.' Even without a patent, and without a statute of limitations, Lord Mansfield held that a possession of one hundred years was evidence of a right against the Crown."

* * * * * * *

"*If the questions in this cause may be deemed to belong to a court of equity, I cannot persuade myself that they are therefore never to be put at rest by lapse of time.* It would be an alarming doctrine to hold that every man in the State who holds any land under a grant before the Revolution may be turned out of possession by the plaintiffs if a king was cheated who, one or two hundred years since, made the grant."

Though the period of time in that case was longer than that covered by the delay in this case, yet it is most apparent that, practically, the difference is unimportant. In this case, also, all the actors and their witnesses have also "long since returned to their original dust, and no one but Him who rules in Heaven can tell what was or what was not concealed from them."

In a case where a patent was actually set aside at the instance of a private citizen, the suit being brought in the name of the United States, the Court based its decision on the ground that there had been no laches. The Court said:

"Hughes has no right to complain, for so soon as it was discovered that he had defrauded the Government, and those claiming under it, his purchase-money was tendered, and a surrender of his patent demanded; but he refused to receive the money or surrender his legal advantage."

United States *v.* Hughes, 11 How., 568.

In the case of Maxwell *v.* Kennedy, 8 How., 221, the suit was brought to enforce a judgment, and it was alleged that it was not barred because the statute of limitations

only applied to domestic judgments, whereas that in question was a foreign judgment. The Court said:

"It is unnecessary, in this view of the case, to determine whether the statute of limitations of Alabama does or does not apply to this judgment. For the reasons above stated, we think the lapse of time upon the facts stated in the bill and exhibits is, upon principles of equity, a bar to the relief prayed, without reference to the direct bar of a statute of limitations."

* * * "Every principle of justice and fair-dealing, of the security of rights long recognized, of repose of society and the intelligent administration of justice, forbids us to enter into an inquiry into that transaction *forty years after it occurred, when all the parties interested had lived and died without complaining of it*, upon the suggestion of a construction of a will different from that held by the parties concerned, and acquiesced in by them through all this time."

Miller, J., in Clark *v.* Boorman, 18 Wall., 509.

The case of United States *v.* Moore, 12 How., 222, was a suit under a special act of Congress to obtain a confirmation of a Spanish claim. In the opinion the Court say:

"*We are called on to decide in this case according to the rules governing a court of equity, and are bound to give due weight to lapse of time.* The party was under no disability, and slept on his rights, as he now claims them, for nearly fifty years, without taking a single step. He makes no excuse for his delay, and cannot now get relief by having his title completed. No case has come within our experience where obscurity and antiquity of the transactions, more forcibly than in the present case, required a court of equity to bar a complaint on legal presumptions founded on lapse of time, and where the bar should take the place of individual belief."

The case of the United States *v.* Arredondo, 6 Peters, 746, arose on a petition under a special act of Congress for settling land titles in Florida, the appellee claiming

under a Spanish grant. The suit was in chancery, and it was conceded that the suit must be tried between the United States and the claimant just as if it had been a suit between individuals. The Court said:

"Though we should even doubt, if sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity, according to its established rules. Our rules must be in conformity with the principles of justice, which would, in such a case as this, not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

In Brown *v.* County of Buena Vista, 95 U. S., 160, the Court said:

"The statute of limitations of Iowa of five years, perhaps, does not apply, because the fraud, if it existed, was not known sufficiently early. The statute could run only from the time of the discovery. But a court of equity applies the rule of laches according to its own idea of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual, is a question to be resolved by the sound discretion of the Court.

"The facts in this connection to which we have adverted are entitled to grave consideration.

"'Nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence. Where these are wanting the Court is passive, and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this Court.'

"The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

Harwood *v.* Railroad Co., 17 Wall., 81, is a case of a suit brought in chancery to set aside a judgment as having been procured by fraud. The Court said:

"Without reference to any statute of limitation, the Courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen."

In Badger *v.* Badger, 2 Wall., 94, Grier, J., said:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

"In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases courts of equity, acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the Chancellor.

"The party who makes such an appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondents to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in the bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In Piatt *v.* Vattier, 9 Peters, 416, Story, J., said:

"The established doctrine, or, as Lord Redesdale phrased it, 'the law of courts of equity,' from its being a rule adopted by these Courts, independently of any positive legislative limitations, is that it will not entertain stale demands. Lord Camden stated, in a very pointed manner: 'A court of equity,' said he, 'which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept on his rights, or acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the Court is passive, and does nothing; laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation of suit in this Court.'"

The language is quoted in Bowman *v.* Wathen, 1 How., 194; opinion by Daniel, Judge. In this last case the Court also cite, with approval, the language of Lord Redesdale in Hovenden *v.* Lord Anneslay, as follows:

"It can never be a sound discretion in the Court to give relief to a person who has slept on his rights for such a lapse of time; for though it is said, and truly, that the plaintiffs in this suit, and those under whom they claim, were persons embarrassed by the frauds of others, yet the Court cannot act upon such circumstances. If it did, there would be an end of all limitations of actions in cases of distressed persons; for if relief might be given after twenty years on the ground of distress, so it might after thirty, forty, or fifty; there would be no limitation whatever, and property would be thrown into confusion."

In Boone *v.* Chiles, 10 Peters, 248, the Court said:

"A court of chancery is said to act on its own rules in regard to stale demands, and independent of the statute. It will refuse to give relief where a party has long slept on his rights, and where the possession of the property claimed has been held in good faith, without disturbance, and has greatly increased in value."

Harwood *v.* Railroad Co., 17 Wall., 81, is a case of a suit brought in chancery to set aside a judgment as having been procured by fraud. The Court said:

"Without reference to any statute of limitation, the Courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen."

In Badger *v.* Badger, 2 Wall., 94, Grier, J., said:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.

"In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases courts of equity, acting upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the Chancellor.

"The party who makes such an appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondents to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in the bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

In Piatt *v.* Vattier, 9 Peters, 416, Story, J., said:

"The established doctrine, or, as Lord Redesdale phrased it, 'the law of courts of equity,' from its being a rule adopted by these Courts, independently of any positive legislative limitations, is that it will not entertain stale demands. Lord Camden stated, in a very pointed manner: 'A court of equity,' said he, 'which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept on his rights, or acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the Court is passive, and does nothing; laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation of suit in this Court.'"

The language is quoted in Bowman *v.* Wathen, 1 How., 194; opinion by Daniel, Judge. In this last case the Court also cite, with approval, the language of Lord Redesdale in Hovenden *v.* Lord Anneslay, as follows:

"It can never be a sound discretion in the Court to give relief to a person who has slept on his rights for such a lapse of time; for though it is said, and truly, that the plaintiffs in this suit, and those under whom they claim, were persons embarrassed by the frauds of others, yet the Court cannot act upon such circumstances. If it did, there would be an end of all limitations of actions in cases of distressed persons; for if relief might be given after twenty years on the ground of distress, so it might after thirty, forty, or fifty; there would be no limitation whatever, and property would be thrown into confusion."

In Boone *v.* Chiles, 10 Peters, 248, the Court said:

"A court of chancery is said to act on its own rules in regard to stale demands, and independent of the statute. It will refuse to give relief where a party has long slept on his rights, and where the possession of the property claimed has been held in good faith, without disturbance, and has greatly increased in value."

In Sullivan *v.* Portland R. R. Co., 94 U. S., 811, the Court said;

"To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation should be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to objection by reason of the laches of the complainants, the Court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for the Court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

* * * * * * * * *

The Court also quote from the opinion in Smith *v.* Clay, Ambler, 645:

"Laches and neglect are always discountenanced, and from the beginning of this jurisdiction there was always a limitation to suits in this Court."

Sullivan *v.* Portland R. R. Co., 94 U. S., 811.

In the opinion in the last case the Court twice cite, with approval, the case of Wilson *v.* Anthony, (19 Ark., 21,) in which the Court used the following language:

"But where the statute is not relied on as a defense, or where there is no statute of limitation, a court of equity will not aid in enforcing stale demands where the party has been guilty of negligence, and has slept on his rights. The Chancellor refuses to interfere after an unreasonable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost."

In Cholmondeley *v.* Clinton, (2 Jac. & Walk., 141,) Sir Thomas Plumer said:

"In the courts of equity in this country the principle has been always, as I shall hereafter show, strongly enforced. They have refused relief to stale demands even in cases where no statutable limitation existed; and whenever any statute has fixed the period of limitation, by which the claim, if it had been made in a court of law, would have been barred, the claim has been, by analogy, confined to the same period in a court of equity.

* * * * * * *

"These cases show, first, that courts of equity have, at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands where the party has slept upon his rights, and acquiesced for a great length of time; and, secondly, that whenever a bar has been fixed by statutes to the legal remedy in a court of law, the remedy in a court of equity has in the analogous cases been confined to the same period. I should not have thought it necessary to cite authorities upon points so long and so clearly established had not the present decision tended, as it appears to me it does, to call them in question, and had it not been of such transcending importance that no doubt should exist upon questions so materially affecting the titles to real property."

In Elmendorf *v.* Taylor (10 Wheat., 173) the Court cite, with approval, the language of Lord Redesdale in Hovenden *v.* Lord Annesley, (2 Sch. & Lef., 607,) in which Lord Redesdale "reviewed the cases which had been determined, and said 'that it had been a fundamental law of State policy, in all countries and at all times, that there should be some limitation of time, beyond which the question of title should not be agitated. In this country the limitation has been fixed (except in writs of right and writs depending on questions of mere title) at twenty years.' 'But it is said that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit

and meaning of the statutes, and have been always so considered.'" After reasoning for some time on this point, and citing several cases to show "that, wherever the Legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitation," he says, '*a court of equity is not bound to impeach a transaction on the ground of fraud where the fact of the alleged fraud was within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down that every right of action in equity that accrues to the party, whatever it may be, must be acted upon, at the utmost, within twenty years.*'"

The case of Elmendorf *v.* Taylor was a suit by one who had entered public lands to compel another who had entered the same lands to convey to him. Judge Story, after deciding that the claim was barred in equity by laches of twenty years' standing, said:

"This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, Cholmondeley *v.* Clinton, 'strict trustees, whose duty it is to take care of the interest of *cestui que trusts*, and who are not permitted to do anything averse to it.' They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of the Court, a complete bar in equity. An ejectment would be barred did the plaintiff possess a legal right."

In the case of Hume *v.* Beale, 17 Wall., 348, a case of a trust for a married woman, the trust was never repudiated by the trustee, and there was no pretense that the statute of limitations could be made to apply. But a long period of time had elapsed, during which the trustee had not been called to account. The Court said:

"Whether Beale, under the deed of Benjamin Berry, was the trustee of a mere dry, legal estate, or whether his duties and responsibilities extended further, it is not important to determine. In any aspect of the case, there has been such gross laches on the part of the *cestui que trusts* that they have disentitled themselves to the relief which they seek to obtain. It is an established rule with courts of equity, independent of any statute limiting the time within which suits can be brought, that they will not entertain stale demands. This rule is necessary from considerations of public policy, and because it is impossible to do entire justice when the transactions sought to be impeached have become obscure by lapse of time, and the evidence on the subject is liable to be lost. Story, referring to the rule imposing diligence upon parties seeking relief, says: 'Hence, if there be a clear breach of trust by a trustee, yet if the *cestui que trust*, or beneficiary, has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose."

"This rule, requiring the party injured to seek redress within a reasonable time, has so often received the sanction of courts of equity in this country and England that it is unnecessary to cite authorities to sustain it. Whether the lapse of time is sufficient to bar a recovery must, of necessity, depend upon the particular circumstances of each case."

In Burke *v.* Smith, 16 Wall., 401, the Court said:

"*Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed* BY CHANGING THE FORM OF HIS BILL? WE THINK NOT. We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him."

Burke *v.* Smith, 16 Wall., 401.

In Smith *v.* Clay, Ambler, 645, Lord Camden said:

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive and does nothing. Laches and neglect are always discoutenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this Court. Therefore, in Fitter *v.* Lord Macclesfield, Lord North said rightly that, though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree but upon very apparent error. '*Expedit republicæ ut sit finis litium*' is a maxim that has prevailed in this Court in all times, without the help of an act of Parliament."

In Miller *v.* McIntyre, 6 Peters, 66, the Court affirmed, with emphasis, what had been said in Elmendorf *v.* Taylor, remarking that certain cases had been "cited to show that the statute does not run except as against a grant. This," the Court said, "is undoubtedly the case at law, but a different rule has been established in equity. The Courts of Kentucky and elsewhere, by analogy, apply the statute in chancery to bar an equitable right, where at law it would have operated against a grant." The Court conclude by saying that "in all cases where an adverse possession has continued for twenty years, it constitutes, in the opinion of this Court, a complete bar in equity."

In McKnight *v.* Taylor, 1 How., 168, C. J. Taney said:

"If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to have been paid. But we do not found our judgment on the presumption of payment; for *it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands.*

There must be conscience, good faith, and reasonable diligence to call into action the powers of the Court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions may have been obscured by time and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this Court in Piatt *v.* Vattier, 9 Peters, 516; and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting the Court is passive, and does nothing; and, therefore, from the beginning of equity jurisdiction there was always a limitation of suit in that Court."

The Court added:

"And as to all the creditors named in the schedule, they had originally an easy and simple remedy in their own hands, to be used or not at their own pleasure; and if they have suffered it to be lost by the lapse of time, their own negligence can give them no right to call into action the powers of the court of chancery."

In another case this Court said:

"The complainants here assail the validity of this decree as having been rendered without service on the deceased, who was then a minor under ten years of age, upon an answer filed by a guardian *ad litem*, who was not authorized to waive service on his ward. It is not necessary to examine into the validity of the decree for this or any other reason. This deed purports to pass whatever title the deceased possessed in the lands conveyed under the probate sale, whether it be considered as the two undivided sevenths of the whole fractional section or the tract assigned to him on the partition. It gave, at least, color of title. Whenever an instrument by apt words of transfer from the grantor to the grantee—whether such grantor acts under the authority of judicial proceedings or otherwise—in form passes what purports to be the title, it gives color of title. The deed of the commissioner in this case, with the return of the commissioners in the partition proceedings, gave

such color. Even should they be considered as invalid, possession under them for the period prescribed by statute bars the right of the true owners as effectually as possession under the most perfect title. It is an absolute defense to the action of ejectment, and a suit in equity brought after that period for the determination of the title and for possession of the property will not be entertained, as it is founded on a stale claim. As the statutes of limitations in most States, and in Indiana among them, apply in terms only to legal remedies, courts of equity are considered as bound by them only in cases of concurrent jurisdiction. In other cases they are said to act only by analogy, and not in obedience to the statutes. Though the present case is in form only a suit in equity, and as the bill seeks for an injunction, it may be so treated, it is essentially a suit to recover the possession of the land. The complainants are out of the possession, and the defendant, or parties claiming under him, are in possession. The determination in favor of the complainant's title is only preliminary to a decree for the surrender of possession. If not a concurrent remedy with the common-law action of ejectment, it so nearly resembles the latter as to justify the rule that in such cases the statute equally applies."

Hall *v.* Law, 102 U. S., 465.

"Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which govern courts of law in like cases, and this rather in obedience to the statute of limitations than in analogy. In many other cases they act upon the analogy of the statutory limitations at law; as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles or claims touching real estate.

"Support to these legal propositions is found everywhere; but there is a defense peculiar to the Courts of equity founded upon the lapse of time and the staleness of the claim where no statute of limitations governs the case. Such Courts in such cases often act on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has

been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."

Godden *v.* Kimmell, 99 U. S., 210.

"Laches and neglect," says Mr. Justice Swayne, "are invariably discountenanced in equity, and, therefore, there has always been a limitation of suits in such Courts from the beginning of their jurisdiction. Limitations of the kind are dictated by experience, and are founded on a salutary policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof.

"Difficulties often arise in controversies of the kind in getting at the truth, so as to administer justice with anything like reasonable certainty. That the parties to the original transaction have long since deceased, is shown from the proofs in the case, and it is improbable that many or all of their clerks or agents may be inaccessible as witnesses for the same or some other reason; or, if alive, and their attendance as witnesses may be secured, they may not be able to remember anything about the transactions."

Id., 212.

In Williams *v.* United States, 92 U. S., 461, a bill was filed to correct an error in the decree of special commissioners to settle certain Mexican land titles.

The Court held that, as the parties had acquiesced for fifteen years in the decree of confirmation, it was too late for them to disturb it.

In Marsh *v.* Whitmore, 21 Wall., 181, the Court held:

"At any rate, the claim now presented is a stale one. The complaint does not set forth specifically any grounds which could have constituted impediments to an earlier prosecution of his suit. He does not even inform us when he first became acquainted with his supposed wrongs. His language is that he was not aware of the purchase by the defendant *until lately*—language altogether too vague to invoke the action of a court of equity."

In the late case of U. S. *v.* Lee, 1 Federal Reporter, 250, the question depended, as it does here, on the sovereignty of the United States, which it was contended conferred upon the Government immunity from suit, just as it is contended here that the same sovereignty confers immunity from the statute of limitations. But the Court held that this soveignty could not be "permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant *or a necessary party to the suit.*"

As a suit for the same relief contemplated by the bill in this case could, with much greater propriety and less circumlocution, have been brought in the names of the claimants themselves, it is obvious that the United States is not a necessary party to the suit.

The Court, further on in the same case, in speaking of one claiming against the United States, said:

"When he, in one of the courts of competent jurisdiction, has established his rights to property, then there is no reason why deference to any person, natural or artificial, *not even the United States*, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

Here there was an adjudication by the land officers in favor of Beebe, after twenty years of hostile litigation. Now, after the patent has been issued for nearly half a century, what reason can there be why the equitable doctrine of laches shall not be set up against "any person, natural or artificial," or "even against the United States?"

In the case last quoted the Court cite, with approval, what was said by Marshall, C. J., in U. S. *v.* Peters, 5 Cranch, 115: "But it certainly never can be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the Court, and prevent their looking into the suggestion and examining the validity of the title."

In Moore *v.* Robins, 96 U. S., 532, the Court, in speaking of an assumed power in the Land Department to investigate and pass upon titles after the issue of patents, held that, after the patent has been issued, their functions are at an end. The Court said:

"It is a matter of course that, after this is done, neither the Secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey, subject to the right of the officers of the Government to annul his title.

"If such a power exists, when does it cease? There is no statute of limitations against the Government; and if this right to reconsider and annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded."

In Johnson *v.* Towsley, 13 Wall., 84, the Court, in speaking of the same assumption of power, asked:

"If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights?"

This inquiry is as pertinent to the action of the Attorney-General as to that of the land officers. If he may bring a suit, or authorize it to be brought, after fifty or sixty years, and may then vex the landholder with the anxiety, costs, trouble, and expense of a law-suit, involving, probably, a temporary depreciation of value, which, in many exigencies, may be ruinous to the private citizen, what limit is there to his "power over private rights?"

This is certainly a mistaken conception of the laws operating on the rights of landholders, "thought," to use the language of the Court, "to be like a disease planted in the vitals of men's estates, and a disease against which no human prudence could have guarded them, or at least no practical prudence, considering the state of the country and the nature of their interests."

Hawkins *v.* Barney, 5 Peters, 464.

That any one should suppose that the Attorney-General possesses such an eternal power to harass the private citizen, must be reckoned as one of the most remarkable delusions that ever befogged the human intellect.

In Case *v.* Terrell, 11 Wall., 201, in noticing the cases in which the United States voluntarily becomes a party to the suit, the Court said:

"But in these cases the Government came into Court of its own volition to assert its claim to the property, and *could only do so on condition of recognizing the superior rights of others.*"

In the case of Lansdale *v.* Smith, 106 U. S., 391, Mr. Justice Harlan said:

"It has been a recognized doctrine of courts of equity from the very beginning of their jurisdiction to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims. * * * The case must be one which appeals to the conscience of the Chancellor."

The Court cite Wagner *v.* Baird, 7 How., 258, where Justice Grier, after declaring the general principle, said:

"The party guilty of laches cannot screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability."

Finally, we may conclude this inquiry with the distinct and emphatic language of Mr. Justice Field in United States *v.* Flint, 4 Sawyer, 58:

"But if we admit that the Attorney-General is authorized to direct the institution of a suit like the present in the name of the United States, and that the District Attorney has been thus directed, his power in this respect must be exercised in subordination to those rules of procedure and those principles of equity which govern private litigants seeking to avoid a previous judgment against them. *The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the Courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals.* Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial, or take an appeal within the same time, and in like manner, and they are equally bound to act on evidence within their reach; *and when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief.*

"Although on grounds of wise public policy no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made, the changed condition of the parties and of the property from lapse of time, the difficulty, from this cause, of meeting objections which might, perhaps, at the time have been readily explained, and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the Court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the Government be the suitor against him.

* * * * * * * * *

"After the archives were arranged, and the alleged unsearchable condition ceased, nearly eighteen years elapsed before the present bill was filed, and no excuse is offered for this delay. During these eighteen years, which constitutes a period equivalent almost to a century in other countries, great changes in the condition and value of real property in the State have occurred. During this period the original claimant, who might, perhaps, have explained

the alleged alteration of dates, has deceased, and third parties have acquired his interests, and, it is said, have made valuable and expensive improvements upon the property. Courts of equity will not entertain a suit to vacate a decree, even in case of palpable frauds, when there has been unnecessary delay in its institution, and the rights of third parties, as in this case, have intervened in reliance upon the decree. Considerations of public policy require prompt action in such cases; and if by delay in acting innocent parties have acquired interests, the Courts will turn a deaf ear to the complaining party. *This is the doctrine of equity*, irrespective of any statute of limitations, and *irrespective of the character of the suitor*. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property."

We find daily that it is extremely difficult to prove beyond a reasonable doubt, or in any satisfactory manner at all, the truth regarding events that occurred but a week or a month ago. If we should attempt to go back for a period of more than sixty-four years, to the time that Philbrook died, to scan the long line of individual words and transactions between parties long since dead, down to the time of the issue of the patents nearly fifty years ago, it is obvious that we should find ourselves involved in a labyrinth of hopeless doubt and perplexity. Fortunately it is not necessary for us to engage in such a task. The decisions of the land officers, the issue of the patents, the long acquiescence of all parties, are far more convincing than any other evidence would be, unless an Attorney-General could depopulate our cemeteries in order to fill the court-room with witnesses, equipped with powers of memory beyond anything that we know in that line. Among the many wise things uttered by the great lights of the bench and the bar, few are wiser, or more fitly expressed, than that memorable saying of Lord Plunket:

"Time is the great destroyer of evidence, but he is the great protector of titles. He comes with a scythe in one

hand to mow down the muniments of our possessions, while he holds an hour-glass in the other, from which he incessantly metes out the portions of duration that are to render the muniments no longer necessary."

Tenth Proposition—The charges of fraud made are too vague to found a decree upon.

This Court has said many times that charges of fraud must be definite and specific. The proof must be correspondingly certain.

Colorado Coal and Iron Co. *v.* United States, 8 Sup. Ct. Rep., 131.

The general allegation that the "receiver was coerced to believe" a false state of facts is plainly no allegation at all in the eyes of the law.

The opinion of the Court below is an able one, and is worthy of a careful perusal.

Respectfully,

U. M. Rose.
S. W. Williams.

127-338
127-338

Office Supreme Court U. S.
FILED.
OCT 19 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 180.

THE UNITED STATES, APPELLANT,

vs.

CHARLES W. BEEBE *et al.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF ARKANSAS.

MOTION TO DISMISS.

Come said appellees, by U. M. Rose and S. W. Williams, their solicitors, and move the Court to dismiss the appeal herein because as shown by the affidavits herewith filed, as well as by the certificate of the clerk of the court below attached to the transcript herein, the said transcript is grossly defective, especially in omitting exhibits which are referred to in the pleadings and which are necessary to their proper comprehension. (See The Grapeshot, 7 Wall, 563.)

U. M. ROSE,
S. W. WILLIAMS.

UNITED STATES OF AMERICA,
Eastern District of Arkansas, } ss:

Be it remembered that on this day came before me, a commissioner of the United States, Ralph L. Goodrich, to me well known, and made oath as follows:

I am now clerk of the United States circuit court for the eastern district of Arkansas, and was such on the 7th day of November, 1884, on which date I certified the transcript in the case of the United States, appellant, against Charles W. Beebe *et al.*, now pending in the Supreme Court of the United States as No. 180 on the docket of said Court for the October term, 1887, and that at the request of the solicitors of the plaintiff I omitted from said transcript the following papers and records, which were on file in said cause:

City Directory, attached to defendant's plea for additional parties.

Deposition of Wm. E. Woodruff, filed by defendant.

Motion for *dedimus potestatem* for above deposition, filed by the defendant.

Opinion of Geo. McCrary, circuit judge, on demurrer to bill.

Brief of defendant, by U. M. Rose.

Exhibit "B" to Exhibit "B 10," inclusive, to original bill filed by plaintiff.

Exhibit "C" to Exhibit "C 3, C," inclusive, to original bill filed by plaintiff.

Exhibit "D" to Exhibit "D 2," inclusive, to original bill, filed by plaintiff.

Exhibit "E," Philbrook's will, to original bill.

Exhibit "H," to original bill filed by plaintiff.

Exhibit "I" to Exhibit "I 3," inclusive, filed by plaintiff.

Exhibit "C 4" to Exhibit "C 6," to amended bill filed by plaintiff.

Motion for process to serve on non-resident defendants, filed by plaintiff.

Motion for leave to amend bill and set time, filed by plaintiff.

Motion to amend the record, filed by plaintiff.

Motion to retain defendant's papers on file, filed by plaintiff.

Brief for plaintiff and exhibit, filed May 10th, 1883.

Brief for plaintiff, filed May 31st, 1883.

Brief for plaintiff, filed May 21st, 1883.

Writs in the cause.

And I further say that said papers and records were omitted from said transcript, as far as I know, without the consent of the appellants.

And further deponent sayeth not.

RALPH L. GOODRICH.

Sworn to and subscribed before me this 14th day of October, 1887.

HENRY C. CALDWELL,
U. S. Dist. Judge.

UNITED STATES OF AMERICA,
Eastern District of Arkansas, } *ss:*

On this day came before me, a United States commissioner for said district, U. M. Rose and S. W. Williams, to me well known, who made oath as follows:

We are counsel for appellees in the cause pending in this court and referred to in the foregoing affidavit, and were of counsel in said cause in the court below, and that we never at any time consented to the omission from the transcript of the papers enumerated in said affidavit, and that no such consent was given by said appellees or by their counsel; also that in our judgment copies of the exhibits filed with the plaintiff's pleadings in the court below, and the paper referred to in said affidavit as "City Directory," attached to

the defendant's "plea" for additional parties, are indispensable to a proper understanding of this cause on the present appeal.

U. M. ROSE.
SAM. W. WILLIAMS.

Sworn to and subscribed before me this day.

Given under my hand as such commissioner, at the city of Little Rock, on this 14th day of October, 1887.

[SEAL.] RALPH L. GOODRICH,
Commissioner of the Circuit Court, East. Dist. Ark's.

7-338

Office Supreme Court U. S.
FILED
NOV 14 1887
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
v.
CHARLES W. BEEBE ET AL.
No. 180.

An Appeal from the United States Circuit Court for the Eastern District of Arkansas.

In Answer to Motion of Defendants to Dismiss the Appeal.

Now come the appellants, by their attorney, and submit the following affidavit and brief in answer to the said motion:

IN THE UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF ARKANSAS.

In the cause whereof THE UNITED STATES are Plaintiffs, *v.* CHARLES W. BEEBE et al., are Defendants.

Affidavit of Liberty Bartlett, Attorney for the United States.

I, Liberty Bartlett, being first duly sworn, do state that I am an attorney at law, and by appointment and instruc-

tions of Attorney-General Brewster, to the District Attorney Charles Waters, I served as such attorney in the prosecution of the above-entitled cause and the demurrer of the defendants, which was sustained, also, in the prosecution of the appeal in procuring and transmitting the transcript.

In August, 1884, R. L. Goodrich, clerk of the court, gave me notice to come in and select the papers required to make up the transcript, and make a deposit of $300, before he would commence on the work; and directly thereafter he left the office for his three months' vacation, at the north, leaving his deputy, W. Field, to prepare the transcript.

Together we selected every paper used or referred to on the trial here on the demurrer. If any were omitted, it was overlooked after a careful search, calling for a deposit of sixty dollars.

There were over thirty certified copies of papers of record in the several departments, some of great length that were not before the court, or referred to on the trial of the demurrer, of use only to the plaintiff, and deemed improper to encumber the record, and were omitted at our own loss, if a loss it be.

The work on the transcript was open to the inspection and suggestion of Judge Rose & Son, chief attorneys, out of twelve for the defence, or nearly so; and before closing I called at their office and informed them that it was still open if they desired to add a further record, but none was offered.

The clerk, Goodrich, returned about the time of closing the transcript, and, if correctly informed, he did not examine or know the record made. It was certified by the deputy clerk, Wm. Field.

To show the obstacles put in the way of prosecuting

this suit, I will mention that the case was prepared by the District Attorney Waters, as instructed by the U. S. Atty-Gen. Brewster. The papers were all filed, stamped, and made of record by the clerk Goodrich on the eve of——— 1884, and myself made the attorney of record. The following morning, without notice or a hearing, Goodrich, clerk, erased every endorsement and cast them all out of court, and it required two months before the circuit judge, and the final peremptory order of the Attorney-General Brewster, to effect their restoration.

LIBERTY BARTLETT.

Subscribed and sworn to before me this 5th day of November, 1887.

RALPH L. GOODRICH,
Clerk U. S. Circuit Court
Eastern District of Arkansas,
by W. P. FIELD, *D. C.*

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL IN THE FOREGOING CAUSE.

This suit was brought in the court below by the United States to set aside a land patent illegally issued to the defendants.

The decision below was adverse to the plaintiff upon demurrer to the bill. An appeal being allowed, the transcript was filed in this court November 10, 1884.

The affidavit of Mr. Bartlett, filed herein, shows that the transcript was intended to include all that was deemed necessary and proper; that the defendants' attorneys were asked to make suggestions (with a view of complying therewith) in preparing it, and that only such matter was omitted from it as could be of no use in determining the

correctness of the decision below. As defendants' attorneys made no suggestions as to their views or wishes, the certificate stated what was omitted, and the facts have been apparent of record for three years (page 88 of transcript). We submit that the omissions were proper; that the defendants cannot now take advantage of their own neglect; that a motion to dismiss the appeal is not the proper remedy, and that if it was it has been waived by delay.

Relying upon the statement in Phillips' Practice, p. 156, and cases there cited, that the opinion of the court below forms no part of the record, and knowing that said opinion would appear in the published decisions of the circuit court before the appeal could be heard here (see McCrary's Reports, vol. 4, p. 12), it was deemed proper not to insert it in the transcript.

As to the city directory, depositions, briefs of attorneys, interlocutory motions, last wills, and similar documents, referred to in affidavit of Clerk Goodrich, none of them served any useful purpose in determining whether the demurrer was well taken and would only encumber the record and they were properly omitted.

Railway Co. *v.* Stewart, 95 U. S. 279.

Pennock *v.* Dialogue, 2 Peters, 15.

The attempt to include material matter only was made in good faith, due regard being had to the wishes of the defendants.

Railroad Co. *v.* Schutte, 100 U. S., 647.

The defendants do not now show how the omissions are material to the issues made by the demurrer, and they file an affidavit of the clerk of the court, saying they were made without the consent of the appellants.

II.

The defendants having refused to speak or make any suggestion as to their views or wishes relating to the transcript, when invited to do so, and while the record was still open to receive whatever they thought to be material, they are estopped from complaining of such omissions or urging their materiality. There is hardly a limit to the right of a party to waive objections and rights secured to him by rules of law, and in numberless cases he is presumed to have waived them by his conduct, and even by silence or by omitting to assert them at the proper time.

This court often says "*non constat*, but that the amendment could and would have been made if the objection had been suggested. It would be fair neither to the court nor to the other party to permit the objection to be raised here for the first time."

Newcomb *v.* Wood, 97 U. S., 581–3, and cases cited.

Indeed, the rule is broad and far-reaching that if one be silent when in good faith he ought to speak, or by his conduct leads another to do what he otherwise would not, he will not be heard to the injury of the latter in that respect.

Hayward *v.* National Bank, 96 U. S., 617.

Morgan *v.* Railroad, 96 U. S., 720.

Swain *v.* Seamens, 9 Wall., 254.

Dickerson *v.* Colgrove, 100 U. S., 580.

In this case the defendants not only refused to speak when asked, but, knowing of the omissions, they waited three years before making any objections thereto. This is fair neither to the court nor to the appellants.